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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 271

FRED SELTENREICH and HAWLEY EVANS, a partnership, d/b/a Fairbanks Air Service, JESS BACHNER, W. C. MITCHELL and DAVID B. PHILLIPS, a co-partnership, d/b/a Fairbanks Aircraft Service,

Petitioners,

vs.

THE TOWN OF FAIRBANKS, and FAIRBANKS SCHOOL DISTRICT, an Independent School District Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause, affirming the judgment of the District Court for the District of Alaska, Fourth Judicial Division, number 13,357, and the order of said Court of Appeals denying Petitioners' Petition for Rehearing.

OPINIONS AND ORDERS BELOW.

On the 4th day of March, 1952, the District Court for the District of Alaska, Fourth Division, entered an order denying Plaintiffs-Petitioners' Motion for Interlocutory Injunction, said judgment being based upon a written opinion of even date therewith which is reported in Volume 103 of Federal Supplement at page 319.

On the 10th day of March, 1954, judgment was entered by the Court of Appeals for the Ninth Circuit affirming the judgment of the trial court, said judgment being based upon an opinion of even date therewith which is reported in Volume 211 of Federal Reporter, Second Series, at page 83.

A Petition for Rehearing was denied on the 30th day of April, 1954.

On the 27th day of July, 1954, an order was entered by the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, extending the time in which to file Petition for Writ of Certiorari to and including the 10th day of August, 1954.

Copies of said judgments, opinions and orders are appended hereto.

JURISDICTION.

Jurisdiction of this Court is invoked under Article I, Section 10 of the Constitution of the United States, the judgment of the Court of Appeals for the Ninth Circuit in construing statutory enactment of the Territory of Alaska having impaired the obligation of contracts, and the 5th and 14th Amendments to the Constitution of the United States, Petitioners having been deprived of property and property rights without due process of law.

The statutory provision conferring jurisdiction on this Court is Title 28, Section 1254 (1), United States Code.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the District Court for the District of Alaska Fourth Division, and the Court of Appeals for the Ninth Circuit decide a question which was not open on hearing of Motion for Interlocutory Injunction and prejudice the position of Petitioners on final hearing?

2. Did the decisions, while going beyond the question of a *prima facie* showing made for the purpose of obtaining an interlocutory injunction, proceed upon assumptions of fact not sustained by the evidence which petitioners could have negatived by proof adduced at final hearing?

3. Has there been a fair compliance with Rule 52 (a) of the Federal Rules of Civil Procedure?

4. Should said decisions be allowed to stand, would petitioners be deprived of property and property rights without due process of law?

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Article I, Section 10 of the Constitution of the United States; Amendments 5 and 14 to the Constitution of the United States; Title 16, Article I, Section 35, Sub-division 20 of Alaska Compiled Laws Annotated, 1949; Chapter 61, Session Laws of Alaska, 1951; and Rules 7 (a), 8 (c) and 52 (a) of the Federal Rules of Civil Procedure.

STATEMENT OF CASE.

On the 12th day of October, 1951, petitioners and others filed a complaint in the District Court for the District of Alaska, Fourth Division, seeking to enjoin and restrain the City of Fairbanks, Alaska, from

disposing of, closing, interfering with or interrupting the use of the Fairbanks Municipal Airport, said airport, by resolution of the Common Council of said City, having been designated as Weeks Field.

On the same date a Motion for Interlocutory Injunction was filed and an order was entered by the Court requiring that Defendant Town of Fairbanks appear at the hour of 4:00 o'clock P. M. on the 15th day of October, 1951, to show cause why said interlocutory injunction should not issue.

On motion of the Fairbanks School District an order was entered on October 13, 1951, allowing said School District to intervene. An answer was filed by said intervenor on the 16th day of October, 1951.

An answer was filed by Defendant Town of Fairbanks on October 16, 1951.

On October 16, 1951, arguments were heard on Petitioners' Motion for Interlocutory Injunction and the Court took the matter under advisement.

Three days later, and on the 19th day of October, 1951, Petitioners filed an additional Motion for Temporary Restraining Order, based upon an affidavit, this time requesting an order restraining an overzealous city from erecting a power line across the Weeks Field runway. The construction of said power line would have, and did, effectively close said airfield.

The Court's order:

"Denied this 19th day of October, 1951, as no cause of action for a restraining order is shown

and also prior motion for an injunction in this cause is pending awaiting the filing of briefs in this cause."

s/ Harry E. Pratt
District Judge

The happening sought to be prevented by the interlocutory injunction was effectively accomplished by the erection of the power line across the runway.

On the 9th day of November, 1951, Defendant Town of Fairbanks filed an amended answer.

The Court kept the matter under advisement. Time, and more time passed until the 4th day of March, 1952, 140 days later, when the Court in a written opinion passed on the motion for interlocutory injunction and denied same.

The Court did not make its findings of fact and enter its conclusions of law in regard to whether or not a sufficient showing had been made to entitle Petitioners to an interlocutory injunction pending final hearing as provided by Rule 52 (a) of the Federal Rules of Civil Procedure but proceeded to determine the case as if on final hearing.

Appeal was taken to the Court of Appeals for the Ninth Circuit, which Court disregarded the contentions of all parties and proceeded to determine the case upon its merits, and in so doing, decided a question which was not open and before the Court.

The judgment of the District Court was affirmed.

There is presently pending in the Court of first instance a complaint seeking equitable relief. By the

actions heretofore undertaken by the Courts of trial and appellate jurisdiction, the action has already been decided upon its merits, without first having given Petitioners their day in Court. As a consequence thereof, Petitioners have been deprived of property and property rights without due process of law.

BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE.

Title 48, Section 101, United States Code, provides, in part, as follows:

> "There is established a District Court for the District of Alaska, with the jurisdiction of District Courts of the United States and with general jurisdiction in civil, criminal, equity and admiralty causes; * * *."

ARGUMENT.

Plaintiffs' complaint stated a cause of action. Intervenor Fairbanks School District filed an answer and Defendant Town of Fairbanks filed an answer and amended answer. All of said answers admitted and denied portions of the allegations contained in Plaintiffs' complaint and contained several affirmative defenses. The cause was at issue.

At the time of the filing of their complaint Plaintiffs moved for an interlocutory injunction pending the trial of the action. The Court took the matter under advisement.

Due to the fact that the rights and property of Plaintiffs were in danger of irreparable injury because of the planned construction of a power line across the runway of the airport, Plaintiffs asked for a temporary restraining order to prevent the Town of Fairbanks from constructing said power line pending the decision of the Court on the temporary injunction then before it. The trial Court arbitrarily and with an uncommon abuse of its judicial discretion denied the motion for the restraining order.

The power line was constructed, thereby effectively closing the airport. This was the very thing that Petitioners sought to prevent by their Petition for Interlocutory Injunction which the Court, at that time, had under advisement.

In an outstanding demonstration of disregard for the principles upon which the systems of American and English jurisprudence are founded and with a callous exhibition of judicial oppression, the trial Court held the motion for interlocutory injunction under advisement for a period of 140 days, during which time Plaintiffs were allowed to wither on the vine, their businesses to be irreparably damaged and their means of livelihood taken from them.

At the end of the ruinous 140 days the Court, not content with merely denying the motion for interlocutory injunction which was the only question open to it at the time, in a written opinion and in complete disregard of the Federal Rules of Civil Procedure decided the case on its merits.

An orderly presentation of the questions before this Court requires that they be considered in the sequence set forth above.

QUESTION NUMBER ONE.

DID THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, FOURTH DIVISION, AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDE A QUESTION WHICH WAS NOT OPEN ON HEARING OF MOTION FOR INTERLOCUTORY INJUNCTION AND PREJUDICE THE POSITION OF PETITIONERS ON FINAL HEARING?

An examination of the written opinion of the District Court reveals that the following questions were resolved:

1. Where deed executed in 1922, by trustee for townsite of Fairbanks, Alaska, in favor of Town, provided that land conveyed was to be held in trust for park and recreational purposes and that if any portion was used for other purpose title would revert to grantor, and thereafter federal government recognized fact that deed was either void or voidable and made exchange of deeds whereby United States through subsequent townsite trustee deeded said tracts to town without any limitation or retriction whatsoever as to use tracts were to be put, and although town used tracts conveyed for airport purposes, it specifically retained control of airport and made rules requiring doing of certain acts by those using airport, including payment of rent for hangar and other facilities in payment of landing fees, etc., the tract was never dedicated to public use as an airport.

2. Where deed conveying to town of Fairbanks, Alaska, tract of land of 5.28 acres contained no limitation as to use of ground conveyed thereby, and did not provide that reversion of title should take place if land were used for any particular purpose, deed could not act as a dedication of property for any particular purpose.

3. Under laws of Alaska, when a deed describes land by metes and bounds and makes an erroneous statement as to acreage involved, deed conveys land as described by metes and bounds and in disregard of alleged acreage.

4. Where grantors deeded to Territory of Alaska a piece of land described by metes and bounds alleged to contain 60.5 acres, and grantors thereafter executed form of deed which was merely a statement that their deed contained 62 acres, instead of recited 60.5 acres, that they wanted to give excess over 60 acres to town of Fairbanks when a more correct description of excess was ascertained, and Territory of Alaska conveyed identical land to Town by means of description identical with that of deed, statement on part of grantor was immaterial, as Town received all of tract alleged to contain 60.5 acres and also two acres exceeding the 60.5 acres.

5. Where grantors deeded realty to Territory of Alaska without limitation to use Territory was to put land conveyed, fact that grantors in subsequent deed recited that their former deeds to Territory was intended to convey ground for airfield purposes, was

insufficient to constitute proof of making dedication of property for public use as an airfield.

6. Where ordinance of Town of Fairbanks establishing municipal airport provided for setting apart as much of the "park reserve" as necessary for use of landing field, but provided nothing in ordinance should be construed to divest town of its title to lands embraced within park reserve, nor as a surrender by Town of its right to manage park reserve as public park, and provided for an airport commission and for termination of leases and that buildings located on leased land should become the property of City if not removed within 30 days after termination of lease, such provisions negatived any intention on part of town to dedicate land mentioned as "park reserve" to public use as airport.

7. Ordinance of Town of Fairbanks, Alaska, promulgating regulations for operation of municipal airport providing that only aircraft and airmen licensed by Civil Aeronautics Authority of the United States could operate on or over airport, except student fliers or public aircraft, providing that persons using airport for commercial aviation or other commercial or private purpose should first secure permit from city clerk and pay fees and charges prescribed, and that any one violating ordinance shall be subject to fine and/or imprisonment and suspension from use of airport not to exceed 30 days made it clear that town did not and had not relinquished ownership and control of airport and the right to use same as source of income and to administer such use to full

extent of powers given to it in regard to other property of municipality.

8. Where Common Council of Town of Fairbanks, Alaska, passed resolution that town was not financially able to continue maintenance of municipal airport, that construction and operation of new airport approximately two miles from city, which was available for public use and by all aircraft carrying freight and passengers to and from city, was larger, better constructed and safer and ample to serve all needs of city and general public, that municipal airport was no longer being used, except by small one-engined airplanes and that buildings in close proximity rendered municipal airport to longer safe, and the land embraced in airport was needed for housing and recreational purposes and municipal airport would be ordered closed, resolution furnished cumulative evidence of fact that town did not intend to convey tracts used for municipal airport to use of public.

9. Where property of the Town of Fairbanks, Alaska, used for purpose of municipal airport remained property of city, not subject to any public trust, city had full power to pass ordinance ordering the closing of the airport under statutory provisions, to prohibit conduct endangering public peace, public health, or public safety, and the owner of the property had the right to prohibit the use of its property for landing and take-offs of airplanes inasmuch as that was greatly endangering public safety.

10. Where no answer or denial of any sort was filed by plaintiffs to intervenor's first affirmative

defense, it would be assumed that Plaintiffs intended to and did admit the matters set forth in such defense.

11. Execution by Town of Fairbanks, Alaska, of deed of property, formerly used for municipal airport to independent school district, implied finding on part of common council of town that in its judgment land deeded was no longer required for municipal purpose, and as realty had never been acquired or held for any public use or devoted thereto, no ratification of sale and execution of deed was required by statute.

12. Where realty owned by Town of Fairbanks, Alaska, used for municipal airport purposes was never dedicated by town to such use, if common council failed to make finding that in their judgment premises were no longer needed for municipal purposes, or that in their judgment it was advantageous to city to donate premises to school district, such failure on part of council would not inure to benefit of Plaintiffs or assist them in making out any sort of case for obtaining preliminary injunction to restrain abandonment of municipal airport by town.

13. Where description of land in propositions of ballot of special election of February 21, 1950, in Town of Fairbanks, Alaska, were so vague and indefinite as not to give voters knowledge of land referred to, propositions were invalid and did not furnish ratification by voters of any ordinance or other sale of realty.

14. Where propositions submitted on ballots of special election of February 21, 1950, held in Town

of Fairbanks, Alaska, for purpose of obtaining ratification by voters of sale of real estate contain sufficient description of land, but did not show that common council passed ordinance setting forth terms of proposed sale and consideration therefor, and that council in their best judgment determined premises were no longer required for municipal purposes, proposition was invalid and did not furnish ratification by voters of any ordinance or other sale of real estate.

15. A common law dedication requires a definite intention on the part of grantor to dedicate designated land to public use.

16. A common law dedication requires that an intention on part of grantor to dedicate designated land to public use be shown clearly and unequivocally.

17. Where deeds by which realty was conveyed to town of Fairbanks, Alaska, contained no limitation requiring land to be used for an airfield and contained no clauses stating that if land conveyed were used for any purpose other than airport purposes, it would revert to grantor, plaintiff's right to restrain use by town of property for other than airport purposes and to restrain closing down of airport could not be based on an express dedication, as none existed, and in absence of elements of common law dedication, could not be based on such a dedication.

18. Under statute providing that common council, in order to make available sites for operation thereon of new industry, which will benefit civic welfare of

municipality, may sell, lease or dispose thereof on such terms or conditions as may be deemed advantageous to civic welfare of municipality, to such persons or corporations as will agree to install, maintain and operate thereupon such new "industry" and such sites, shall not be deemed to be "property" acquired, owned or held for any public use or devoted thereto, housing authority is within meaning of quoted word.

19. Under statute providing that common council, in order to make available sites for operation thereon of new industries which will benefit civic welfare of municipality, may sell, lease or dispose of on such terms or conditions as may be deemed advantageous to civic welfare of municipality to such persons or corporations as will agree to install, maintain and operate thereon such new industry and such sites, shall not be deemed to be property acquired, owned or held for any public use or devoted thereto, common council of Fairbanks, Alaska, could sell, lease, or otherwise dispose of land previously devoted to airport purposes, by making such lands available as sites for new housing industry by complying with terms of statute.

20. Where deed executed by grantor to town of Fairbanks, Alaska, recited as a part of consideration that grantor should have continuous, free and uninterrupted right-of-way to and from municipal airport to one of the lots, and grantor alone signed deed, recital that grantor was to have right-of-way constituted self-serving declaration which was not binding on town, and grantor's rights under deed were a

mere license which would terminate on death of either party, and was not transferable or descendable.

21. An easement requires both a dominant and a servient tenement.

22. An easement must rest upon a grant thereof, it cannot exist by parol.

23. A plaintiff must have a clear right to the issuance of a preliminary injunction.

24. Where plaintiffs failed to establish that realty owned by municipality was dedicated to public use as an airport, and evidence showed that independent school district had built a school house costing $600,000 on airport property after closing of airport, and that if plaintiffs' application for preliminary injunction to restrain closing of the airport was granted grounds could not be used by reason of danger of injuring and killing some of the 450 school children if planes were permitted to land and take off from field, and there was no showing by plaintiffs of any damage for any specific amount if preliminary injunction were denied and defendant town alleged as affirmative defense that plaintiffs were indebted to defendant for use of airport and plaintiffs made no showing whatsoever that defendant or intervenor school district were unable to respond in damages to any extent that was probable in action, plaintiffs' application for preliminary injunction would be denied.

The only question properly before the Court and open to decision was whether or not sufficient showing had been made to entitle Plaintiffs to an interlocutory

injunction. From the above items, numbered 1 to 24, inclusive, it is abundantly obvious that more than one question was resolved. It is also abundantly obvious that the running commentary and observations of the Court on the alleged "facts" or "assumptions of fact," most of which are misleading or erroneous and which could have been negatived by plaintiffs by proof adduced upon final hearing, are highly prejudicial to petitioners on final hearing.

The Court of Appeals for the Ninth Circuit was a bit more restrained in its determination, finding only the following:

1. Under statute authorizing municipalities to sell, lease or otherwise dispose of property when in judgment of city council same should no longer be required for municipal purposes, council has power to determine that property ceases to be needed for public use, without necessity of ratification by voters, and not necessarily coincidental with sale of or other disposal of property.

2. An airport operated under normal conditions and with adequate supervision and controls is not a "nuisance per se."

3. Where airport was little used, a better airport having been made available by government, and new school building had been constructed nearby with result that continued use of field endangered children and other persons, Fairbanks council properly closed the airport and enacted ordinance prohibiting use thereof, and operators of aircraft service who did

not own airport were not entitled to injunction against such action.

Can it be said that the Court of Appeals for the Ninth Circuit did not decide questions not open and to the prejudice of the position of Petitioners?

QUESTION NUMBER TWO.

DID THE DECISIONS, WHILE GOING BEYOND THE QUESTION OF A PRIMA FACIE SHOWING MADE FOR THE PURPOSE OF OBTAINING AN INTERLOCUTORY INJUNCTION, PROCEED UPON ASSUMPTIONS OF FACT NOT SUSTAINED BY THE EVIDENCE WHICH PETITIONERS COULD HAVE NEGATIVED BY PROOF ADDUCED AT FINAL HEARING?

Perhaps the outstanding contribution of the trial Court to the reported law of this country is the following:

> "Where no answer or denial of any sort was filed by plaintiffs to intervenor's first affirmative defense, it would be assumed that plaintiffs intended to and did admit the matters set forth in such defense."

Based upon the foregoing gem of judicial reasoning and wisdom, the trial Court proceeded to *assume* as *fact* all of the allegations contained in the various affirmative defenses set forth as parts of the answers of defendant Town of Fairbanks and intervenor Fairbanks School District—even the affirmative defenses set forth as a part of the answer of defendant Town

of Fairbanks filed on November 9, 1952, after the matter had been taken under advisement.

That the effect thereby given to Rules 7 (a) and 8 (c) of the Federal Rules of Civil Procedure is contrary to all accepted interpretations is beyond question.

> "The concept that it is the function of the pleadings to create issues of fact is as true under the rule (Rule 7) as under the former practice but even after the pleadings are closed, the issues to be determined may be modified, enlarged or narrowed before trial.
>
> While the pleadings are not closed until answer has been filed, there is no place in modern procedure for useless or frivolous pleadings. Ordinarily the complaint and answer are all that are necessary.
>
> A reply is required to a counterclaim, but not to any other allegations of the answer containing the counterclaim, and is the final pleading required or permitted.
>
> An answer must be filed to a cross-claim and a third party answer to a third party complaint.
>
> In brief the rule permits only necessary pleadings.
>
> No reply is required to an answer which does not assert a counterclaim.
>
> Affirmative defenses included in the answer do not necessitate a reply nor is a reply permitted to such answer unless the Court orders a reply. Some real reason or necessity must be shown in order to justify the Court in requiring a reply to an answer." 1 *Barron and Holtzoff,* Section 243.

See also:

Fine v. Paramount Pictures, 171 F (2d) 571;
Jordan v. Hartford Accident and Indemnity Company, 77 Fed. Supp. 817;
American Cutting Alloys v. General Electric Company, 135 F (2d) 502;
First Presbyterian Church of Santa Barbara, California v. Rabbitt, 118 F (2d) 732.

The matters above set forth, which were *assumed* to be fact by the Court, were used as a basis for not only denying the interlocutory injunction prayed for but for deciding the case upon its merits.

By adding insult to injury, the Court of Appeals for the Ninth Circuit in its opinion *assumed* to find as follows:

> "The school building itself is said to extend into the airport runway."

Such a finding is sufficient to remind one of a choice piece of malicious gossip which is added to and made more vicious by each purveyor.

Were these *assumptions* sustained by the evidence? Could they have been negatived by proof adduced at final hearing? Let us consider.

Intervenor admits in paragraph III of its first affirmative defense (which the Court assumed to be fact) that the School District undertook to construct and operate the school with full knowledge of the existence of the municipal airport. The deed to the property upon which the school building is situate contains the following reservation:

"The Grantor (Town of Fairbanks) reserves, as long as Weeks Field shall be operated as a municipal airport and for six (6) months thereafter, the right to the uninterrupted use of all the land lying northerly of a line 110 feet southerly and parallel to the landing field light line used in connection with the operation of Weeks Field as an airport, said line being more particularly shown upon the plat referred to above and made a part hereof. The Grantor reserves the right to lease any of the lands hereinabove reserved for airport or similar purposes, for a like period."

With such knowledge and after accepting such reservation, intervenor complains of irreparable damages to be sustained due to the continued use of the airport facilities. Intervenor complains that it (through its Board of Directors) has resolved to keep the new school closed until the airport is closed; that if it does so it will suffer actual damages in the amount of $134,800.00, the loss of the use of a $660,000.00 school building and with a demagogic and wholly unnecessary and unjustified conclusion, states the following:

"That the loss of human resources can not be estimated in dollars and cents. That no amount of money can compensate for the loss of educational opportunity to the school children by reason of the closure of Denali School; that two years of makeshift schoolroom and classroom usage scattered around the Town of Fairbanks will exact a toll in child health that can never be remedied and cannot be measured in dollars and cents. For

the plaintiffs to inflict such conditions upon helpless children for purely commercial gain is neither just nor equitable."

Equitable? More about equities!

"That Intervenor is informed and believes that the following named Plaintiffs are indebted to the City of Fairbanks for the use of Weeks Field airport in the past, and that such indebtedness is in the amount stated opposite the names of each plaintiff and is and remains unpaid:

Northern Consolidated Airlines	$5,500.00
Fairbanks Air Service	565.00
Alaska Flying School	480.00

That by reason thereof, the plaintiffs so indebted to the City of Fairbanks are not entitled to the equitable relief which they here seek, because of the equitable maxim that he who comes into equity must come with clean hands."

Equitable? Perhaps *this* Court is familiar with the doctrine of equitable estoppel.

After a running commentary upon the lack of merit of Plaintiffs' action, the trial Court made the following observation:

"In Paragraph XI of Plaintiffs' Amended Complaint it is stated: 'That each of the Plaintiffs herein is engaged in the aircraft or allied business at or adjacent to Weeks Field; are property owners adjacent to Weeks Field and have vested property interests therein.'

The Defendant and Intervenor have denied the matters set forth in Paragraph XI above men-

tioned. Other than the Gillam easement no evidence of any sort was introduced by the Plaintiffs to substantiate any of the allegations in said Paragraph XI. As the burden of proof is on Plaintiffs to prove the allegations of their amended complaint by a preponderance of the evidence in the case, and the plaintiffs having failed entirely to do so, it becomes apparent . . ."

This was an allegation of fact made by Petitioners which was denied by Defendant and Intervenor. Certainly this was a fact at issue in the action which was subject to proof to be adduced at final hearing.

The trial Court made an *assumption of fact* based upon the denial of Defendant and Intervenor. Such *assumption* was highly prejudicial to Petitioners and was one which could have been negatived by proof.

It might well be noted that the answers of Defendant and Intervenor were filed on the 16th day of October, 1951, the date upon which the matter was taken under advisement by the Court. The amended answer of Defendant was filed on November 9, 1951. Could Petitioners be penalized for something they were doubly precluded from doing—by law and by time?

The trial Court made an *assumption of fact* to the effect that Weeks Field constituted a nuisance, said *assumption* being based upon the allegations contained in the affirmative defenses contained in the answers of Defendant and Intervenor. An airport is not a nuisance per se. See: *Thrasher v. City of Atlanta,*

176 SE 817; *Anderson et al v. Souza,* 232 P 274; *Swetland v. Curtis Airports Corp.,* 55 F (2d) 201, 83 A L R 319; *Kuntz v. Werner Flying Service,* 43 NW (2d) 475; *Brooks et al v. Peterson et al,* 31 So. (2d) 472; *Thrasher v. Atlanta,* 173 SE 817, 99 A L R 158; *Delta Air Corp. et al v. Kersey et al,* 20 SE (2d) 245; *Kersey v. City of Atlanta,* 20 SE (2d) 245; *Hayde et al v. Somerset Air Service, Inc., et al,* 1948 U S Av R 601; *Antonick et al v. Chamberlain et al,* 1947 U S Av R 518; *Batcheller v. Commonwealth,* 1930 U S Av R 1; *Smith v. New England Aircraft Company,* 170 NE 385; *Warren Township School District v. Detroit,* 14 NW (2d) 134; *Crew et al v. Gallagher,* 1948 U S Av R 167; *Rhodes v. Biacitelli,* 1948 U S Av R 534; *Oechsle et al v. Ruhl,* 54 Atlantic (2d) 462; *Vanderslice v. Shawn,* 11 Atlantic (2d) 87.

Since an airport is not a nuisance per se it must, if a nuisance at all, be a nuisance in fact. A determination of this fact is a judicial function, a determination which must be made after all the facts are before the Court and all interested parties have had an opportunity to be heard, and not upon a mere *assumption of fact* taken from controverted issues upon which the parties have not been heard.

The foregoing *assumptions of fact* by the trial Court, and numerous others, were not sustained by competent evidence. They were premature findings based upon the affirmative defenses contained in the answers of defendant and intervenor which were entitled to no more weight than the allegations contained in Petitioners' complaint.

Being premature and subject to being negatived by proof upon final hearing, such *assumptions of fact* are most prejudicial to the rights of Petitioners.

By making the *assumption of fact* contained in its opinion, which were taken from the answers and affirmative defenses filed by Defendant and Intervenor and not supported by evidence, the Court of Appeals for the Ninth Circuit felt constrained to interpret Title 16 Article 1, Section 35, Subdivision 20 of *Alaska Compiled Laws, Annotated,* 1949 and the amendment thereto contained in Chapter 61, *Session Laws of Alaska,* 1951.

By making these premature and unjustified assumptions and basing its opinion thereon, the Court has run squarely afoul Section 10 of Article 1 of the *Constitution of the United States.*

It is alleged in Petitioners' complaint and denied in the answers of Defendant and Intervenor that contractual rights are involved. Whether or not such contractual rights and property rights exist is a matter to be determined upon final hearing by competent evidence, not by allegation and denial.

To interpret the statute in such a way as to allow any municipality created by statute to, by ordinance, impair the obligation of contract, is a clear violation of Petitioners' constitutional rights.

It is well settled that action by a municipality comes within the purview of said section. See: *Cuyahoga River Power Company v. City of Akron,* 240 U S 462.

The decision of the Court of Appeals for the Ninth Circuit, based upon a question which was not before the Court and open to decision, would necessarily, should it appear upon final hearing that contractual rights were involved, be in violation of said section 10.

Its consideration in general is amply demonstrated by the finding that "the school building itself is said to extend into the airport runway", said finding being so clearly negatived by the facts presented as to preclude discussion.

These questions, and others, decided by the Courts below and based therein upon *assumptions of fact* which were not sustained by competent evidence, when such questions were not before either Court, most certainly prejudice the rights of Petitioners.

Had the Courts below confined themselves to the one and only issue presented, all of these assumptions would have disappeared or have been negatived by proof adduced upon final hearing.

QUESTION NUMBER THREE.

HAS THERE BEEN A FAIR COMPLIANCE WITH RULE 52 (a) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

Rule 52 (a) of the Federal Rules of Civil Procedure is, in part, as follows:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * *."

It is well settled that where interlocutory injunction is denied without findings of fact or conclusions of law as required by the above stated Rule, the judgment will be reversed and the case remanded. See: *Brown v. Quinland, Inc.*, 18 F (2d) 228; *Mayo v. Lakeland Highlands Canning Company*, 309 US 310.

Findings of fact should be pertinent to the issue and supported by the evidence. In *Schilling et al v. Schweitzer-Cummings Co.*, 142 F (2d) 82, the Court stated:

> "The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence. To the extent that they are, in addition, non-argumentative in form, free from conclusions of law and from the redundancy so frequently found in pleadings, they will be more useful to all concerned."

While we hold no argument with the fact that such required findings of fact and conclusions of law may be included in and made a part of a written or memorandum opinion, we do insist that the trial Court speaks only through its findings and judgment. The opinion must, of necessity, be based upon its findings and the findings must be confined to the question or questions open and be supported by competent evidence.

Since only one question, viz, whether or not sufficient showing had been made to entitle Petitioners to an interlocutory injunction pending final hearing, was open to the Court, facts relative to that question, and that question alone, should have been found. Any variation therefrom would not constitute a fair compliance with the Rule.

In *Hartford-Empire Co. v. Shawkee Mfg. Co.*, 147 F (2d) 532, the Court stated:

> "Findings of facts are not to be made in vacuo but only in connection with an issue of fact which is before the Court for adjudication and after the evidence bearing upon that issue has been received and considered by the fact finder. For us to direct the District Court, in advance of its having heard the plaintiff's defense to the defendant's counterclaims, to make the fact findings which they seek would be to compel the Court to prejudge crucial fact questions in the case, a procedure which is abhorrent to the concepts of fairness involved in due process of law. Moreover, it might well be discovered after the hearing that the findings so made without knowledge of the issues in the solution of which they

were to be employed had been framed in such a way as to be quite inappropriate to meet the fact issues actually presented to the Court for determination."

Consider the situation in the present case in the light of the above quoted well reasoned opinion. Certainly the entire procedure had in the Courts below was abhorrent to the concepts of fairness involved in due process of law.

"It is of highest importance to a proper review of the action of a Court in granting or refusing a preliminary injunction that there should be a fair compliance with Rule 52 (a) of the Federal Rules of Civil Procedure.", *Mayo v. Lakeland Highlands Canning Co.*, supra.

It can not by any stretch of the imagination be concluded that there was a fair compliance with the Rule. The errors, unjustified findings and assumptions of the trial Court led the Court of Appeals for the Ninth Circuit into committing grievous error.

QUESTION NUMBER FOUR.

SHOULD SAID DECISIONS BE ALLOWED TO STAND, WOULD PETITIONERS BE DEPRIVED OF PROPERTY AND PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW?

What is due process of law depends on the circumstances. It varies with the subject matter and the necessities of the situation.

Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase:

> "The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice."

In *Hagar v. Reclamation District,* 110 US 516, this Court stated the following:

> "By due process of law is meant one, which following the forms of law, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Under those requirements, could it be due process of law for a Court to entertain a motion for an interlocutory injunction and to arbitrarily refuse to protect the rights of Petitioners even while the motion was pending and while the Court had the matter under *advisement;* to hold the motion under advisement for a period of 140 days while Petitioners were being irreparably damaged; to deny the motion for interlocutory injunction upon *assumptions of fact* clearly forbidden by the Federal Rules of Civil Procedure; to, while making and proceeding under said

unjustified assumptions of fact, proceed to consider questions which were not open to the Court upon the hearings; to, while considering those questions, proceed to decide the case upon its merits and to base its decision upon controverted issues which could be negatived by evidence adduced at final hearing; to leave petitioners with a pending equity action which, in effect, has already been disposed of on a motion for interlocutory injunction; to, in effect, deny petitioners their day in Court.

We think not. Should the decisions of the District Court for the District of Alaska, Fourth Division, be allowed to stand, Petitioners will be deprived of property and property rights without due process of law.

CONCLUSION.

Petitioners have been required, in this Court and in the Court of Appeals for the Ninth Circuit, in view of the action of the trial Court to argue matters of procedure and its effect upon their constitutional rights. Had the trial Court confined itself to the issues presented, the whole matter would very likely have been disposed of long ago. Since the trial Court essayed to assume facts from controverted issues which could have been negatived by proof on final hearing, Petitioners have been deprived of their day in Court; have been deprived of property and property rights without due process of law.

For the above stated reasons, the Petition for Writ of Certiorari should be granted.

Dated, Fairbanks, Alaska,
July 30, 1954.

Respectfully submitted,
HUBERT A. GILBERT,
Attorney for Petitioner.

GEORGE B. MCNABB, JR.,
ROBERT A. PARRISH,
Of Counsel.

(Appendix Follows.)

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Appendix

In the District Court for the District of Alaska
Fourth Division

No. 6926

Fred Seltenreich, et al,
Plaintiffs,
vs.
The Town of Fairbanks,
Defendant,
Fairbanks School District,
Intervenor.

ORDER

Whereas, the above-named plaintiffs filed a motion herein upon the 12th day of October, 1951, asking for a preliminary injunction in the above-mentioned cause; and

Whereas, argument was had upon the motion and the same was duly submitted by the parties upon plaintiffs' amended complaint, defendant's answer, intervenor's answer, and three affidavits; and

Whereas, it appears to the Court from the matters set forth in its opinion in this case of even date herewith that said motion for a preliminary injunction should be denied;

It is therefore ordered and adjudged that said motion be and the same hereby is denied.

Dated at Fairbanks, Alaska, this 4th day of March, 1952.

s/ Harry E. Pratt
District Judge

Entered in Court Journal March 4, 1952.

(Endorsed): Filed March 4, 1952.

In the District Court for the District of Alaska
Fourth Division

No. 6926

Fred Seltenreich and Hawley Evans, a partnership doing business as Fairbanks Air Service, Jess Bachner, W. C. Mitchell and David B. Phillips, a co-partnership doing business as Fairbanks Aircraft Service,

Plaintiffs,

vs.

The Town of Fairbanks and Fairbanks School District, an independent School District Corporation,

Defendants.

OPINION

Robert A. Parrish and George B. McNabb, of Fairbanks, Alaska, attorneys for plaintiffs;

Julien A. Hurley and Mike A. Stepovich, of Fairbanks, Alaska, attorneys for defendants;

Maurice T. Johnson, of Fairbanks, Alaska, attorney for intervenor.

This cause came on for hearing on plaintiffs' motion filed herein on the twelfth day of October, 1951, for a temporary injunction restraining the Town of

Fairbanks, Alaska, from abandoning the business of conducting a municipal airport.

The plaintiffs alleged that the land included within said municipal airport, which is generally known as "Weeks Field", had been dedicated to the use of the public as an airport and devoted to such use for many years, as shown by the exhibits.

The defendant and intervenor maintain that said airport has never been dedicated to a public use or devoted thereto; that the Federal Government has completed an international airport two miles from the Town of Fairbanks which is available to plaintiffs; that the town is losing money in operating said airport and can not afford to do so; that plaintiffs are indebted to defendant, for airport services, as follows to-wit:

Northern Consolidated Airlines	$5,500
Fairbanks Air Service	565
Alaska Flying School	480
Total	$6,545

The motion was argued and submitted upon plaintiff's amended complaint, defendant's answer, intervenor's answer, and the affidavits of L. F. Joy, James C. Ryan, and E. A. Tonseth.

Briefs were submitted by counsel for all parties.

Wherever "exhibits" are herein mentioned, the reference will be to the exhibits attached to plaintiffs' amended complaint, unless the contrary is specifically stated; "SLA" will be used to designate the Session

Laws of Alaska; the Town of Fairbanks, will be referred to as the "town" or the "city"; "A. J." will mean American Jurisprudence; and "McQuillin" will mean McQuillin or Municipal Corporations, 3rd Edition.

Sec. I

Dedicated to Public Use.

(a) The following quotations are from Volume 11 of McQuillin

"Accordingly a dedication of land is generally defined as its devotion to a public use by an unequivocal act of the owner of the fees, manifesting an intention that it shall be accepted and used presently or in the future. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication." S. 33.02, pages 579-580.

"In other words, the mere fact that private property is used by the public is not necessarily inconsistent with the absence of an intent to dedicate it to the public * * *. If the user by the public does not exclude the owner's private rights, such user will ordinarily be regarded as merely permissive." Pages 660-662.

"The intent of the dedicator is the foundation and life of all dedications, and the intent must be clearly and unequivocally manifested." Page 669, S. 33.36.

"The burden of proof to establish a dedication is on the party asserting it. Dedication is not presumed nor does a presumption of an intent to dedicate arise

unless it is clearly shown by the owner's acts and declarations, or by a line of conduct the only reasonable explanation of which is that a dedication was intended." Pages 671-2.

"It is variously stated that the evidence to establish a dedication must be clear and conclusive; must be clear and convincing; must be clear and unequivocal; must tend to substantiate a clear intention to dedicate, or must be strict, cogent and convincing." Page 674.

"* * * it is elementary that an acceptance, either by public user or formal act, is necessary * * *. Accordingly, the general rule is that to complete a common-law dedication, acceptance is required. Pages 682-5, S. 33.43.

"The general rule is that proof of acceptance by the public must be unequivocal, clear and satisfactory, and inconsistent with any other construction." Pages 727 and 728, S. 33.54.

The following quotations are from 16 A. J.:

"Dedication is the intentional appropriation of land by the owner to some public use." 16 A. J., page 348, S. 2.

"In all cases, the burden of proof is on the party asserting a dedication." Page 417, S. 75.

"* * * The essence of a dedication to public uses is that it shall be for the use of the public at large * * * and if from the nature of the user it must be confined to a few individuals, such as use of land for piling wood, the idea of dedication is negatived

* * * and a grant by the owner of a private right of way over his land to buyers of different parcels of the same to furnish them with convenient access to the street is no dedication to public use." Page 359, S. 15.

"The intention of the owner to set apart lands or property for the use of the public is the foundation and life of every dedication. * * * This intention is essential whether an express or an implied dedication is relied on. * * * In order to constitute a dedication by parol, there must be some acts proved evincing a clear intention to dedicate the property to public use. In any case the intention must clearly appear and the acts and declarations of the owner relied on to establish it must be convincing and unequivocal * * *. Likewise, the intention must be to make a perpetual dedication." Pages 361-2, S. 17.

Proprietary Use

(b) The following quotations are from 37 A. J.:

"Every municipal corporation has a two-fold character, * * * one is political, governmental, legislative, or public, while the other is variously designated as private, proprietary, municipal, or ministerial * * *. In its governmental or public character, the corporation is made, by the state, one of its instruments * * *. But in its proprietary or private character, the theory is that the powers are supposed not to be conferred primarily * * * from consideration connected with the government of the state at large, but for the private advantage of the compact com-

munity which is incorporated * * *; and as to such powers * * * the corporation is frequently regarded as having the rights and obligations of a private, rather than of a public corporation. * * * The distinction between acts in the performance of a governmental function and those in * * * a proprietary function is that in the case of the former, the municipal corporation is executing the legislative mandate with respect to a public duty generally, while in the other, it is exercising its private rights as a corporate body * * * even though the public may derive a common benefit therefrom. * * * All functions of a municipal corporation not governmental are said to be municipal." Page 727, S. 114.

Walla Walla v. Water Company, 172 US page 1;

Linne v. Bredes (Wn.), 86 Pac. 858.

In Seafeld v. Port of Astoria, 16 Pac. 2d, page 943 (Ore.) it is stated as set forth in the syllabus:

"Term 'governmental functions' should be limited to duties imposed by states on municipal corporation, which latter must perform at peril, and other functions of municipal corporation are strictly 'municipal'."

"Property held by municipal corporation in proprietary capacity ordinarily may be alienated without consent of Legislature."

In Arkansas Valley, etc. v. Morgan et al, 229 SW 2d page 134 it is held as stated in the syllabus:

" A city entering into contracts involving, not government of its citizens, but only convenience,

pleasure and profit of city and its people, acts in 'proprietary capacity'."

"Powers granted municipality for private advantages must be regarded as exercised by municipality as private corporation, though public may also derive benefit therefrom."

"A municipal corporation, in its purely business, as distinguished from governmental, relations, is governed by the same rules and held to same standard of just dealing prescribed by law for private individuals or corporations and is clothed with same full measure of authority over its property."

In City of Hazard v. Duff (Ky.), 154 SW 2d, page 29(8) it is stated:

"* * * but the courts in general, and those of this state in particular, are committed to the rule that a municipality engaged in maintaining and operating a waterworks does so in the exercise of a proprietary or private character as distinguished from a governmental character."

In Dix et al v. Port of Orford et al (Ore.), 282 Pac. page 110 (2-4) it is stated:

"As a general rule, the power of a municipality to convey property is equal to its power to acquire it. At common law a municipal corporation, unless restrained by its charter, could dispose of property in the same manner as private individuals. 19 R. C. L. 772. In the instant case, we do not think that the property acquired through purchase was dedicated to a public use. True, it inured to the benefit of the pub-

lic, but the port was engaged in this commercial enterprise for profit as a toll was charged any shipper who used the wharf or docking facilities. It was not open to indiscriminate use by the public. In the maintenance and operation of this property, the port was acting in a proprietary capacity. * * * It held title to property which had been acquired for strictly corporate uses. * * * It is not a case of holding title to property in trust where there has been a dedication to a public use. * * * In our opinion the lower court erred in concluding that the port was exercising a governmental function in the maintainance and operation of this dock and wharf."

"In operating a public utility in a private or proprietary capacity, the municipality possesses the same rights and powers with reference to its management and control that a private owner possesses."

12 McQuillin page 682;

Dolan v. Louisville Water Co., 174 SW 2d 425.

Property which is not appropriated or devoted to a public use may be disposed of by a city without special statutory authority.

Southeastern Greyhound Lines, Inc. v. City of Lexington, 186 SW 2d 203.

In the operation of a public utility, it is generally held that a municipal corporation acts in a proprietary, rather than a governmental, capacity.

37 A. J. p. 729;

12 McQuillin 3rd Ed. p. 678;

18 McQuillin, p. 114 S. 53.100.

"Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all of the inhabitants or residents within the municipal corporation * * *."

37 A. J. page 734.

"The general rule * * * is that property held in a governmental capacity, i.e., for a public use, cannot be sold without legislative authority * * * but it is otherwise as a property held in a private capacity and not devoted to any special public use."

10 McQuillin, page 72;

12 McQuillin, page 678.

"* * * All property of the municipal corporation of a private nature may be sold."

10 McQuillin, page 74.

"All property held by the city in fee simple, without limitation on restriction as to its alienation, may be disposed of by the city at any time before it is dedicated to a public use. In other words, the city has the right to sell or dispose of property, real or personal, to which it has the absolute title * * * in substantially the same manner as an individual unless restrained by statute or charter * * *."

10 McQuillin, page 75.

"* * * Land bought for a public purpose, if not actually so used, cannot be said to be affected by a public trust, and hence may be sold."

10 McQuillin, page 76;

Southeastern Greyhound Lines v. Lexington, 186 SW 2d 202;

Kings County Insurance Co. v. Stevens, 5 NE 353;
People v. State Tax Commission, 202 NYS 310;
City National Bank of Kiowa, 230 Pac. 894;
Seafeldt v. Port of Astoria, 16 Pac. 2d 945;
Haesloop v. Charleston, 115 SE 600;
Williamsburg v. Lyell, 112 SE 668;
Head-Lipscomb-McCormick Co. v. Bristol, 105 SE 500;
Konrad v. Rogers, 36 NW 261.

"So where land is donated to a village without any restrictions it may sell such lands."

Jenkins v. Hanson, 112 NW 216.

"It frequently has been reiterated that a municipality functions in a corporate or proprietary capacity in the operation and maintenance of public utilities * * * consequently municipal ownership of public utilities * * * must of necessity carry with it the same duty, responsibility and liability on account of negligence * * *."

18 McQuillin, page 414 S. 43.100;
37 A. J. 729 N.1. (101).

Sec. II

What the Exhibits Show

(a) Exhibit A is a deed executed July 1, 1922, by George A. Parks as trustee for the townsite of Fairbanks, Alaska, party of the first part, in favor of

the Town of Fairbanks, Alaska, Inc., party of the second part. The deed conveys Tracts G, H, I, and J of said townsite but provides that the land conveyed is to be held in trust for park and recreational purposes and that if any portion of said land is used for other purposes the title thereto will revert to the grantor. The townsite mentions section 11 of the Act of Congress approved March 3, 1891 (26 Stat. 1095-99) and the regulations thereunder as his authority.

26 Stat. page 1099 states:

"Sec. 11. That * * * lands in Alaska may be entered for townsite purposes * * * by such trustee * * * as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section 2387 R. S. US * * * and the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the townsite * * * according to the spirit and intent of said section * * *."

Sec. 2387 R. S. US provides:

"Whenever any public lands have been settled upon as a town-site * * * it is lawful, in case such town be incorporated, for the corporate authorities thereof * * * to enter at the proper land-office * * * the land so settled * * * in trust for the several use and benefit of the occupants thereof * * *; the execution of which trust * * * to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

The regulations of the Secretary of the Interior, pursuant to the laws above mentioned, appear in 45 Land Decisions of the Department of the Interior at page 242 and are as follows, with reference to the present inquiry:

"The following regulations are prescribed in accordance with said act" (Sec. 11, Act of March 3, 1891 aforesaid):

"1. If the land is unsurveyed the occupants must, by application * * * obtain a survey of the exterior lines * * *. There must be excluded from the tract to be surveyed and entered for the town site any lands set aside by the district court under section 31 of the act of June 6, 1900 (31 Stat. 321, 332), for use as jail and courthouse sites, also all lands needed for Government purposes or use, together with any existing valid claim initiated under Russian rule."

"* * * 3. The trustee will file his * * * notice of intention to make proof * * * and proof must be made showing occupancy of the tract * * * and that the town site does not contain any land occupied by the United States for school or other purposes or land occupied under any existing valid claim initiated under Russian rule."

"* * * 6. Lands possessed by Indian or native Alaskan occupants shall not be assessed nor conveyed by the trustee."

"* * * 11. After deeds have been issued to the parties entitled thereto the trustee will publish notice

that he will sell * * * all lots and tracts remaining unoccupied and unclaimed at the date of the trustee's entry * * *. The notice of public sale will be published * * * and copies thereof posted * * * Each lot must be sold at a fair price * * *. Lots remaining unsold at the close of the public sale in an unincorporated town may again be offered at a fair price if a sufficient demand appears therefor."

"12. Immediately after the public sale the trustee will make * * * his final report * * *. If the town is incorporated such remaining proceeds may be turned over to the municipality for use and benefit thereof. After the public sale and upon proof of the incorporation of the town, all lots then remaining unsold will be deeded to the municipality, and all municipal public reserves will, by a separate deed, be conveyed to the municipality in trust for the public purposes for which they were reserved."

Section 31 of the Act of June 6, 1900, above mentioned in paragraph 1 of the regulations aforesaid is found in 31 Stat. p. 332. Its provisions as relating to the present inquiry are as follows:

"* * * Any part or portion of the unappropriated public domain of the United States, embracing not more than four thousand square feet * * * may be set aside by order of the court as a jail site * * *, a certified copy of which order of the court shall be transmitted to the Commissioner of the General Land Office * * * and thereafter the ground described shall be reserved from sale or other disposition * * *."

Exhibit B is a copy of a deed issued by the Town of Fairbanks, Alaska, Inc., to the United States of America on January 11, 1950, quit-claiming as to said Tracts G, H, I, and J.

Exhibit C is a deed dated February 9, 1950, from the United States to present Trustee of the Town of Fairbanks, Alaska, Inc., conveying said tracts to the present townsite trustee of Fairbanks, Alaska, and reciting that the provision in the deed of Parks, trustee, requiring said tracts to be used for parks and recreational purposes was unauthorized under the regulations authorizing the issuance of the deed (Regulation July 19, 1916, 45 L. D., par. 12, page 244). Exhibit C does not contain any limitations on the use of said tracts.

Exhibit D is a deed of date February 9, 1950, between the present trustee for the townsite and the Town of Fairbanks, Alaska, Inc. It conveys said tracts to the Town of Fairbanks, Alaska, Inc. without any limitation as to their use.

In Paragraph III of plaintiffs' amended complaint it is alleged that the defendant did acquire, in 1922, the property described in Exhibits A, B, C, and D, as more particularly shown on map Exhibit E.

Whether the Parks' deed (Exhibit A) was void or invalid, it could not operate as a dedication for an airport of the tracts of land therein mentioned, for the reason that it expressly limited the use of the said tracts for the purpose of parks and recreation. It made no attempt to operate as an express

dedication for airport purposes. The Town of Fairbanks, no doubt believing that it was limited to the use of said tracts for parks and recreational purposes, never accepted said Parks' deed as any dedication for airport purposes or otherwise. Neither did the Town of Fairbanks ever accept the limitation of the Parks' deed for parks and recreation. The town did use said tracts for airport purposes but it was in a proprietary capacity. At all times the Town of Fairbanks specifically retained control of the airport and made the rules requiring the doing of certain things by those using the airport including the payment of rent for hangar and other facilities and the payment of landing fees, and so forth.

The Parks' deed was neither void nor voidable, as to the limitation of use for parks and recreational purposes. The Federal Government recognized that fact and made an exchange of deeds in 1950 whereby the United States through the present townsite trustee for Fairbanks deeded said tracts to the Town of Fairbanks without any limitation or restriction whatsoever as to the use said tracts were to be put. It was a clear and unequivocal act showing that there was no intention on the part of the Federal Government to limit the use of said tracts. In fact, there would have been no statutory authorization for the Federal Government to make a limitation on the use that said tracts were to be put. The City of Fairbanks, in 1950, became the owner in fee simple without limitation as to use of said tracts. Said deed of February 9, 1950, from the townsite trustee to the

City of Fairbanks, Inc., gave the city the right to use said tracts without any restriction as to use.

It seems very clear, therefore, that the airport as constituted by the tracts mentioned in paragraph III of said amended complaint has never been dedicated to the public use of the airport.

(b) In paragraph IV of plaintiffs' amended complaint it is alleged that the defendant acquired property from Paul and Stacia Rickert for airport purposes, according to Exhibits F, H, I, and J, as shown on Exhibit E, a map.

Exhibit F is a copy of a deed between Paul J. Rickert and Stacia T. Rickert, parties of the first part, and the Town of Fairbanks, Alaska, party of the second part. The deed sells, conveys, and confirms unto the party of the second part a tract of land of 5.28 acres.

Nowhere in the deed is there any limitation as to the use of the ground conveyed thereby. There is a paragraph of warranty on the part of the grantors and there is a statement that the deed is "for and in consideration of the sum of One Dollar, lawful money of the United States of America, and other good and valuable consideration, to them in hand paid by the party of the second part, the receipt of all which is hereby acknowledged."

The deed (Exhibit G) did not contain any provision to the effect that the land therein mentioned should be used for any particular purpose, nor did it attempt to provide that a revision should take place of the title

if the land were used for any particular purpose. The deed was executed August 10, 1927. The minutes of the council meeting of the Town of Fairbanks on August 23, 1927, recite:

> "A deed from Stacia and Paul Rickert giving the city for airport purposes, 5.28 acres of land from their homestead was read and it was moved * * * that the gift be accepted. Carried."

The deed does not limit the use of the land conveyed to any purpose and does not provide for a reverter in case the land is used for any unauthorized purpose. The deed is a fee simple deed and negatives that the Rickerts had any intention of limiting the use of the land. It certainly could not act as a dedication as none of the elements of a dedication exist in regard to this deed.

Exhibit H is a copy of a deed dated September 11, 1929, wherein Jaul J. Rickert and Stacia T. Rickert, as parties of the first part, deed to the Territory of Alaska, as party of the second part, for and in consideration of the sum of One Dollar, "the receipt whereof is hereby acknowledged," a described piece of land alleged to contain 60.5 acres. There is no limitation whatsoever as to the use the Territory of Alaska is to put said land conveyed.

Exhibit I, while in the form of a deed, is merely a statement on the part of Paul and Stacia Rickert that their deed to the Territory of Alaska (Exhibit H) contains 62 acres instead of the recited 60.5 acres and that they wanted to give the excess over 60 acres

to the Town of Fairbanks when a more correct description of said excess is ascertained. In said Exhibit I it is stated that Exhibit H was "intended to convey 60 acres of ground for airfield purposes * * *" There was no limitation in Exhibit H that the property was to be used for airfield purposes by the Territory of Alaska or anyone else. The deed, Exhibit II, describes the property conveyed by metes and bounds and ends the description by saying it contains 60.5 acres. Under the laws of Alaska, when a deed describes the land by metes and bounds and makes an erroneous statement as to the acreage involved, the deed conveys the land as described by metes and bounds and in disregard of the alleged acreage.

(58-7-3(1) Alaska Compiled Laws Annotated.)

Inasmuch as the Territory of Alaska, by deed of June 23, 1945, Exhibit J, conveyed the identical land mentioned in Exhibits H and I to the Town of Fairbanks by means of a description identical with that of Exhibit H is immaterial, as the town got all of the tract alleged to contain 60.5 acres and also the two acres exceeding the 60.5 acres.

The fact that Paul and Stacia Rickert in their deed (Exhibit I) to recite that their former deed (Exhibit H) to the Territory of Alaska was intended to convey ground for airfield purposes is insufficient to constitute proof of the making of a dedication of the property mentioned in Exhibit H for the public use of said land as an airfield. The deed transferred a fee simple title without limitations and that would control

over the surplus allegation by way of recital in Exhibit H.

Exhibit J is a copy of a deed of date June 23, 1945, wherein the Territory of Alaska deeded to the Town of Fairbanks, Alaska, the property described in Exhibit H by means of a description which is the same as that contained in Exhibit H. There is no mention of the last-mentioned deed of the land being used for any particular purpose.

Consequently it seems clear that the exhibits mentioned in said paragraph IV of plaintiffs' amended complaint (Exhibits F, H, I, and J) do not contain any dedication of any land for a public use and devoted thereto.

(c) In paragraph V of plaintiffs' amended complaint it is stated that Paul and Stacia Rickert did convey to the defendant (as shown by Exhibit G) 5.28 acres by gift for airfield purposes.

Exhibit G is a copy of the minutes of a regular meeting of the City Council of Fairbanks on August 23, 1927. It states among other things:

"Mr. Thompson read a telegram from Gen. Steese to Hawley Sterling stating that $1,000.00 more would be necessary to complete the work on the airport, $500.00 from the City and $500.00 from the Territory. Moved by Kubon seconded by Kennedy that an additional $500.00 be appropriated from City funds for this purpose. Carried. A deed from Stacia and Paul Rickert giving the City for airport purposes 5.28 acres of land from their homestead was read, and it was

moved by Kennedy seconded by Gilcher that the gift be accepted. Carried. * * *"

It is believed that the above minutes do not show that the city or the Territory actually paid the $500 authorized to be paid. Even if the Territory did actually pay the $500, the Territory of Alaska, and not the plaintiffs in this case, would be the party to complain about the abandonment of the airport. Further, the fact that when the Rickerts executed their deed in favor of the city for 5.28 acres, they made no such limitation. That negatives that they desired to limit the use of the land to the purposes of an airport. The deed is an absolute conveyance without any limitation of use. There is no provision for a reverter in case the property is used for purposes other than an airport.

It is believed the deeds of Mr. and Mrs. Rickert (Exhibit F conveying 5.28 acres to defendant and Exhibit H conveying 60.5 acres to the Territory) being without limitation show the intention of the grantors and it controls over their recital in Exhibit I that they had intended, in executing said Exhibits F and H, to limit the use of said lands to airport purposes.

(d) In paragraph VIII the plaintiffs allege that defendant did acquire for airport purposes 370 acres of real property as evidenced by Exhibits Q and R.

Exhibit Q is Resolution No. 21 of the Town Council of Fairbanks, Alaska, submitted and passed on the 9th day of January, 1950. The following portions only are pertinent to this inquiry:

"Resolution No. 21"

"Whereas, the City of Fairbanks did purchase approximately 370 acres of land, being portions of the Rickert and Day Homesteads, for airport purposes; and

"Whereas, the airport known as Weeks Field will be abandoned during the year 1950; and

"Whereas, the city proposes to subdivide the land purchased for airport purposes, together with Tracts 'G', 'H', 'I' and 'J' that was deeded to the City by Trustee Deed so as to encourage housing development in the City of Fairbanks; * * *

"Now, therefore, be it resolved * * * that the Mayor be and he hereby is authorized to exchange deeds with the U. S. Government in order to obtain an unrestricted deed to Tracks 'G', 'H', 'I' and 'J'."

"The vote:

"Ayes: Anderson, Doogan, Fenton, Hoopes, and Van Scoy.

"Nay: None."

Exhibit R is practically the same as Exhibit Q except in that it authorizes an exchange of deeds with W. George Moore.

The plaintiffs seem to believe that if the Town of Fairbanks purchased any land with the intention of using it as an airport they were forthwith estopped from ever using it for anything else or abandoning the airport business altogether.

It is believed that this theory is incorrect.

(e) Exhibit N is an ordinance of the Town of Fairbanks, Alaska, passed upon the 21st day of July, 1931. It establishes "for the use of the City of Fairbanks, Alaska, its inhabitants, and of visiting aircraft * * * municipal airport * * *; that said airport shall be available for use by public, private and commercial aircraft." As much of the "Park Reserve" as may be necessary for use as a landing field is set aside but it is provided that nothing in that ordinance shall be construed as a surrender by the town of its right to regulate and manage the "Park Reserve" as a public park. An Airport Commission was provided for, with authority to promulgate rules and regulations, which shall be in effect until the same shall be altered, amended, or repealed by the Common Council. Any regulation so altered by the Common Council shall not be thereafter subject to any change by said Airport Commission.

A portion of the "Park Reserve" (which is in Tract J) was reserved for the purpose of leasing to those engaged in "commercial," public, or private operation of aircraft. The Mayor was given authority to lease portions of land in said airport. Subparagraph (b) of Section 6 of Exhibit N provides:

"The rental charge for the leased area shall be Ten Dollars per fifty front feet paralleling any runway, or fraction thereof, per year, payable annually in advance."

Subparagraph (c) of said exhibit makes provision for the lessor terminating leases.

Subparagraph (e) of said Section 6 of said Exhibit N provides that buildings erected on leased land shall become the property of the city if not removed within 30 days after the termination of such lease.

From the above, it is clear that the Common Council of the Town of Fairbanks was creating, by said ordinance, an airport which was definitely the property of and under the control of the Town of Fairbanks. Its requirement of rental for using parts of the airport for buildings at a rental therein set forth negatives any intention on the part of the town to dedicate the land mentioned as "Park Reserve" to the public. The ordinance in effect required anyone who wanted to use the airport to atorn to the Town of Fairbanks, Alaska, as their landlord and pay rent and abide by the rules and regulations promulgated by the Airport Commission or the Common Council of the Town of Fairbanks, Alaska.

(f) Exhibit P is a copy of an Ordinance of the Town of Fairbanks, Alaska, of date August 4, 1940. It promulgates regulations. Section 1 provides that only aircraft and airmen licensed by the Civil Aeronautics Authority of the United States shall operate on or over the Fairbanks airport (except student fliers or public aircraft). Section 4 provides that persons using the airport for commercial aviation or other commercial or private purposes shall first secure a permit from the City Clerk and pay the fees and charges

prescribed. Section 35 provides that anyone violating the provisions of the ordinance (Exhibit P) shall be subject to a fine and/or imprisonment and suspension from the use of the airport for not to exceed 30 days.

This ordinance again makes it clear that the Town of Fairbanks, Alaska, did not and had not relinquished ownership and control of said airport and the right to use the same as a source of income and to administer such use to the full extent of the powers given it in regard to other property of the municipality.

(g) Exhibit I is a copy of a Resolution of the Common Council of the Town of Fairbanks, Alaska. Among its provisions are the following:

"Whereas, most of the owners of aircraft now using the municipal airport at Fairbanks, Alaska, commonly known as 'Weeks Field,' have failed and refused to pay to the City of Fairbanks the money now due and owing from said owners to the City of Fairbanks for the use of said airport, and the City of Fairbanks is not financially able to continue the maintenance of said municipal airport or to employ the proper persons to manage and control the same, and,

"Whereas, a new airport, commonly known as the 'International Airport,' has been constructed by the Federal Government approximately two miles from the City of Fairbanks and is now available for the public use and by all aircraft carrying freight and passengers to and from the City of Fairbanks and is a much larger, better constructed airport and is under the control of the Civil Aeronautics Administration

and ample to serve all of the needs of the City of Fairbanks and the general public for a public airport, and,

"Whereas, the 'Weeks Field' airport is no longer being used and has not been used since April 17, 1951, by airplanes of a gross weight of over 12,500 pounds, and is now being used by only a small number of one-engine airplanes, and,

"Whereas, new buildings, including residences and a new school building, have been built in close proximity to said 'Weeks Field' airport and as a result thereof the said 'Weeks Field' airport is no longer safe and the use thereof endangers not only the lives of those who use the airport but the lives of those living in the vicinity of said airport and the children who will attend said school, and

"Whereas, it is no longer necessary or convenient to longer continue the use of said 'Weeks Field' airport for the general welfare or benefit of the general public and the condition of said airport is unfit for the landing aircraft, and,

"Whereas, the land embraced in said 'Weeks Field' is now needed for housing and recreational purposes and can no longer be safely used as an airport;

"Now, therefore, it is hereby ordered by and on behalf of the Common Council of the City of Fairbanks, Alaska, that the said municipal airport commonly known as 'Weeks Field' be, and the same is hereby closed for use as an airport and the use of the same on and after the 15th day of October, 1951, either

for the landing or taking off of airplanes is hereby prohibited.

"Adopted this 17th day of September, 1951.

"ROBERT HOOPES,

"Mayor

(City of Fairbanks Seal)

"Attest:

"E. A. TONSETH,

"Municipal Clerk."

This furnishes cumulative evidence of the fact that the Town of Fairbanks did not intend to convey said tracts to the use of the public.

(h) Exhibit S is a copy of Ordinance No. 527 passed by the Common Council of the Town of Fairbanks, Alaska, upon the 17th day of September, 1951. It provides that it shall be unlawful for anyone to land an airplane or to take off with an airplane from the land known as Weeks Field after the 15th day of October, 1951.

(i) Paragraphs XV A and XV B of plaintiffs' amended complaint allege that Resolution No. 51 (Exhibit O) is in violation of the Constitution of the United States, in that it deprives the plaintiffs of the property without due process of law. It is believed that the matters herein set forth show that no dedication was ever made for the Fairbanks airport; that all of the property of the city hereinbefore mentioned remain the private property of the city, not subject to any public trust, and that the city had full power to pass the ordinance, Exhibit O, under the provisions of

Section 16-1-35 eleventh ACLA 1949 "to prohibit * * * conduct endangering the public peace, public health, or public safety." The town, being the owner of the property heretofore mentioned, had a right to prohibit the use of its property for landing and take-offs of airplanes inasmuch as that was greatly endangering the public safety.

As the mere intention to use said homesteads for airport purposes is a far cry from a dedication of the land to the public for airport purposes, it is believed that Exhibit Q in no way proves any of the issues of this case, even though it be considered that said town at one time intended to use said Day and Rickert homesteads for airport purposes.

The other recitals of the resolution show that notice was given on the 9th day of January, 1950, that Weeks Field would be abandoned during the year of 1950, thus giving ample opportunity to plaintiffs to avail themselves of the airport facilities of the International Airport or elsewhere.

Said Resolution No. 21 also authorizes an exchange of deeds with the United States in order to obtain an unrestricted deed to Tracts G, H, I, and K as authorized by Chapter 7, SLA 1931 (16-1-35, 20th Subdivision, page 196 ACLA '49). That such an exchange of deeds was advantageous to the town, in the judgment of the Common Council, appears by implication from the terms of the resolution.

Exhibit R is Resolution No. 22 of the said Town Council. It is practically the same as Resolution No.

21, except that it authorizes an exchange of deeds with W. George Moore.

Sec. III
Denali Purchase

(a) In intervenor's first affirmative defense it is set forth that it "has acquired from the City of Fairbanks the following described property by deed made and executed on the 9th day of June, 1950, and recorded on the 21st day of June, 1950."

No answer or denial of any sort was filed by the plaintiffs to the intervenor's first affirmative defense. Consequently it is believed that the plaintiffs intended to and did admit the matters set forth in said first affirmative defense of intervenor.

That the deed was duly and legally authorized and executed by the Town of Fairbanks to the intervenor is necessarily admitted by failure to answer said first affirmative defense. Such admission is consistent with plaintiffs' map, Exhibit E, which shows the ground in controversy in this suit to be entirely within the boundaries of the Town of Fairbanks except on the south side. In other words, the Weeks Field shown by said map goes no farther west than to the westerly boundary of the town.

The plaintiffs' position depends entirely upon whether or not a dedication was made of the property constituting Weeks Field. Inasmuch as such a dedication is not sustained by the evidence in this case but

is negatived it would be immaterial, as far as the plaintiffs are concerned, what the position of the intervenor is in regard to said Denali School premises.

The execution of the deed to the intervenor implies a finding on the part of the Common Council of Fairbanks, Alaska, that in its judgment the land deeded is no longer required for municipal purposes. Such a finding and such a deed were authorized by the first clause of Chapter 7 SLA 1931, which became the first paragraph of Section 16-1-35, 20th Subdivision, ACLA 1949. No ratification of said sale of the Denali School lands and the execution of the deed is required by said first clause of Chapter 7 SLA 1931 as to land which had not been acquired or held for any public use or devoted thereto, such as the land within the Denali School premises.

(b) If the Common Council of Fairbanks failed to make the finding mentioned in the first clause of said Chapter 7 SLA 1931 that in their Judgment the Denali premises were no longer required for municipal purposes or, as authorized by the second clause of said Chapter 7, that in their judgment it was advantageous to the city to donate said Denali premises to said school district, such failure on the part of the City Council would not inure to the benefit of the plaintiffs or assist them in making out any sort of a case for a preliminary injunction.

The above stated with due consideration of the fact that said Chapter 7 SLA 1931 and Chapter 27 SLA 1945 constitute a part (along with a number of amendments) of Chapter 61 SLA 1951, which became ef-

fective 90 days after the passage thereof, which was upon the 22nd day of March, 1951.

(c) In paragraph IX of plaintiffs' amended complaint it is stated that Weeks Field, by dedication and user, has become public property, as evidenced by Exhibits G, N, O, P, Q, and R. It is believed that said exhibits last mentioned, as well as all other exhibits in the case, fail to show any dedication of said Weeks Field for a public purpose, but in fact definitely show that it was the intention of the owner thereof to make no such dedication.

While the intervenor and no doubt other persons (excluding the present plaintiffs) have a right to procure the findings of the City Council mentioned above relative to said Denali School premises, such right does not in any way assist the plaintiffs in making out their case.

Sec. IV

Intervenor's Exhibit B

(Ballot of Special Election of February 21, 1950)

(a) The descriptions of land in Propositions Nos. 3, 4, 5, 6, 7, and 8 of said ballot (Exhibit B) are so vague and indefinite as not to give the voters a knowledge of the land referred to. Proposition 3 furnishes a good example. It asks the voter: "Shall the City of Fairbanks sell and convey to the Fairview Development Corporation a parcel of land containing approximately 12 acres and located partially in the original townsite of Fairbanks and partially immediately south

of the south boundary of the original plat of the townsite of Fairbanks * * *."

Propositions Nos. 3, 4, 5, 6, 7, and 8, therefore, are invalid and do not furnish a ratification by the voters of any ordinance or other sale of real estate as mentioned in the fourth clause of Chapter 7 SLA 1931; Section 16-1-35 page 196 ACLA 1949. Such ratification is, however, not necessary under the first and second clauses of said Chapter 7 SLA 1931.

Proposition No. 9 has a sufficient description of the land to be sold but is defective in the following particulars, to-wit:

(1) That there is no showing that the Common Council of Fairbanks passed an ordinance setting forth the terms of the proposed sale and the consideration thereof;

(2) That said Common Council in their best judgment considered that said premises were no longer required for municipal purposes.

There having been no written grant to the public of the land involved in the municipal airport in this case, the only manner in which said lands could be held in trust for the public, in this case, would be if the facts complied with the common law to what constitutes a dedication to the public use.

A common law dedication, as mentioned before, requires a definite intention on the part of the grantor to dedicate designated land to the public use. There was certainly no such intention shown in this case.

A common law dedication further requires that such an intention exists and be shown clearly and unequivocally. Certainly no such matter was shown in this case.

Most of Weeks Field lies within the boundaries of the original Town of Fairbanks, Alaska, in Tracts G, H, I, and J, which were tied up by a limitation for use only as a public park and for recreational purposes from 1912 until 1950. The Town of Fairbanks was very careful in all of its ordinances to show that it was reserving all rights with reference to said tracts. At no time before or after execution of the deed to said tracts without limitation as to the use thereof, did the Town of Fairbanks express any intention to dedicate said tracts to the general public.

(b) Necessity of Reverter Clause in Deed:

In Wright v. Morgan, 191 US p. 55, it was held that where the statute provided "that reservations may be made for parks and other public purposes" in patents it probably meant no more than to explain the motive for a sale under the circumstances at the minimum price; that the deed was a conveyance of title with no restrictions upon its use, nor right of reentry for condition broken; that in view of the strong disinclination of the courts to annex conditions or restrictions in the absence of a clear expression of such intent, it would seem to be the duty of the Court to hold that no such condition or restriction is intended.

In Sharp v. Guthrie (Okla.) 145 Pac. 764, a patent contained the following: "to have and to hold and

maintain the same for the sole and separate use, benefit and purpose of a public park for public uses and no other." On rehearing in 152 Pac. p. 403, the Court held that the City took a fee-simple title, free from any trust or condition, and with power of alienation.

In Ward v. Klamath County (Ore.) 218 Pac. 927, it was held that where the deed provided that a Court House should be built upon the land, but did not provide for a reverter, it gave an indefeasible title.

In 19 A.J., page 527, Sec. 65, it is stated:

"It is a well-settled rule that conditions tending to destroy estates, such as conditions subsequent, are not favored in law. They are strictly construed. Accordingly, no provision will be interpreted to create such a condition if the language will bear any other reasonable interpretation, or unless the language, used unequivocally, indicates an intention upon the part of the grantor or devisor to that effect and plainly admits of such construction."

To the same effect are the cases of Toole v. Christ Church (Texas '40), 141 SW 2d 720, et al., v. City of Houston (Texas '46), 196 SW 2d 553; Board of Education v. Brophy (N. J. 1919), 106 ATL 32, and Briggs v. Grand Rapids (Michigan 1932) 245 NW 555.

(c) In this case it is clear that there was, in the deeds given to the Town of Fairbanks, no limitation requiring the land to be used for an airfield. Likewise in said deeds there was no clause stating that if the land conveyed were used for any purpose other than airport purposes it would revert to the grantor.

Plaintiffs' rights cannot be based upon an express dedication, as none existed. Plaintiffs' rights could be perfected by a common law dedication, but the evidence in this case fails to show any of the elements of a common law dedication and, in fact, definitely shows the lack of such a dedication.

Sec. V

Housing Industry

Chapter 27 SLA 1945, which constitute the second paragraph in Section 16-1-35 page 197 ACLA 1949, provides:

"* * * That the Common Council in order to make available sites for the * * * operation thereon of new industries which will benefit the civil welfare of the municipality * * * may sell, lease, or dispose thereof upon such terms or conditions as may be deemed advantageous to the civic welfare of the community, to such persons * * * or corporations as will agree to install, maintain and operate thereupon such new industry * * * and such sites * * * shall not be deemed to be 'property acquired, owned or held for any public use or devoted thereto' as used herein."

"Industry" is defined as follows:

"The result of operations whereby man changes and makes fit for his use materials which were unserviceable in their natural state."

43 C.J.S. page 40, note 6.

"Trade is defined as commercial enterprises and industries as that branch of trade employing capital and labor."

People Ex Rel. Padula v. Hughes, 16 NE 2d 922-24.

"Any department or branch of art, occupation or business; especially one which employs much labor and capital and is a distinct branch of trade; as the sugar industry."

State Ex Rel. K. C. Power and Light Company v. Smith, 111 SW 2, 515;

Dressen v. Department of Labor, etc. 66 Pac. 2d 869 (the oyster industry).

The housing industry which sprang up during World War II is an industry using untold millions of dollars of capital and enormous numbers of men and women employees. It seems to be included in the definitions of industry above mentioned. It is believed, therefore, that under Chapter 27 SLA 1945 (which became the second paragraph of Section 16-1-35 page 197 SLA 1949, and later the second paragraph of Chapter 61 SLA 1951 with the exception that the word "property" was erroneously spelled "property" in the next to the last line on page 158 Chapter 61 SLA 1951) the Common Council of Fairbanks, Alaska, has authority to sell, lease, or dispose of available sites upon such terms as may be deemed by it advantageous to the civic welfare of the municipality, to such persons as will agree to install, maintain, and operate thereon such new industries. It is believed that the

housing propositions mentioned in Propositions 3 to 9, inclusive, on said official ballot would constitute new industries which would benefit the civic welfare of the municipality of Fairbanks, Alaska. There is no requirement in said Chapter 27 for a ratification by the voters of the action of the Common Council as to such sites. The chapter specially provides that such sites "shall not be deemed to be property acquired, owned, or held for any public use or devoted thereto."

Thus, under said Chapter 27 the Common Council of Fairbanks, Alaska, could sell, lease, or otherwise dispost of the lands mentioned in Propositions 3 to 9, inclusive of said official ballot by making such land available as sites for new housing industries. Under the terms of said chapter it would be necessary for the Common Council of Fairbanks to find that the sale of such sites would benefit the civic welfare of the municipality and that the terms of such sale or sales were deemed by the Common Council to be advantageous to the civic welfare of the municipality. An agreement on the part of the grantees in the deed, or lease, to install, maintain and operate such industries on such sites would likewise be necessary to comply with said chapter.

Perhaps the Common Council of the Town of Fairbanks and the grantees of new industries have already done all that is required of them under said Chapter 27. However, there is no direct showing of compliance with said Chapter 27 made in the pleadings or affidavits upon which this application for a temporary injunction is based. Under said Chapter 27 it is im-

material whether the property in any site mentioned therein was held for a public use or otherwise, as the chapter specifically states that the sites shall not be deemed to be "property acquired, owned, or held for any public use or devoted thereto."

Said Chapter 27 SLA 1945 plays no part with the rights of the plaintiffs in this case, inasmuch as they have no rights in said airport, as no dedication thereof for a public use was ever made.

As is shown by an analysis above set forth with reference to said Chapter 27 SLA 1945, the Common Council of Fairbanks has not made any of the findings which are required in order to sell the municipal property of the Town of Fairbanks, Alaska, or the propositions set forth in Intervenor's Exhibit B or the Denali School premises. The fact that the intervenor and perhaps others have a right to get some of such findings from the City Council does not assist the plaintiffs in making out their case.

Sec. VI

Gillam Easement

(a) Presumably to show a special interest in the subject matter of this action, the plaintiffs allege that one Harold Gillam as party of the first part executed a deed on August 17, 1940, in favor of the Town of Fairbanks, Alaska, grantee (Exhibit M), conveying Lots 1 and 2 of the Rickert Homestead. The plaintiffs claim that Mr. Gillam was the owner of an easement or right-of-way between Lot 3 of said Rickert

Homestead and Weeks Field. The deed which was executed by Harold Gillam to the Town recites a consideration to him in hand paid and further alleges: "and a further consideration that said party of the first part shall have a continuous, free, and unobstructed right-of-way to and from the Fairbanks Municipal Airport to Lot 3." Mr. Gillam alone signed the deed. The recital that he is to have that right-of-way constitutes a self-serving declaration which would not be binding upon the Town of Fairbanks and would not constitute any note or memorandum signed by the party to be bound, to wit, the Town of Fairbanks.

"An easement must rest upon a grant thereof; it can not exist by parol."

17 A.J. 936 par. 18.

"Generally, when an easement is created by express grant, words of inheritance are necessary to make it a perpetual interest. This is said to be the rule also as to easements by reservation * * * Thus, it has been held that the word 'heirs' is necessary to create an easement in fee by way of reservation, but not to create it by way of exception if the grantor owns the fee at the time of the conveyance."

17 A.J., p. 943-4, S. 31.

Gillam's deed imports an oral contract between him and the Town of Fairbanks. It does not set forth a description of the land over which the right-of-way is to run and therefore it lacks an essential element of an easement, which requires both a dominant and a servient tenement.

17 A.J., page 925, N. 11.

Gillam's rights were a mere license, and such license terminates upon the death of either party and is not transferable or descendible.

17 A.J. p. 926, par. 5 and p. 927 N. 9.

Paragraph VI of plaintiffs' amended complaint alleges that Gillam, in executing the deed, retained a right-of-way and that the plaintiffs Northern Consolidated Airlines and Fred Seltenreich and others are successors and assigns of said Gillam. The intervenor has denied all of the allegations of said paragraph VI. An examination of the deed shows that Gillam did not in any possible way retain or except or reserve a right-of-way from the operation of the deed. The only thing we have about a right-of-way is Gillam's own statement appearing in the deed which he, himself, was executing.

As Gillam had nothing more than a license which was unassignable and which could not be inherited, said alleged right-of-way was a mere license which became of no effect when assigned to the plaintiffs.

The question of said easement is immaterial, inasmuch as plaintiffs' case depended upon there being a dedication of Weeks Field and as the evidence shows no such dedication to have existed.

(b) In Paragraph XI of plaintiffs' amended complaint it is stated: "That each of the plaintiffs herein is engaged in the aircraft or an allied business at or adjacent to Weeks Field; are property owners adjacent to said Weeks Field and have vested property interests therein."

The defendant and intervenor have denied the matters set forth in said paragraph XI above mentioned. Other than as to the alleged Gillam easement no evidence of any sort was introduced by the plaintiffs to substantiate any of the allegations in said paragraph XI. As the burden of proof is upon the plaintiffs to prove the allegations of their amended complaint by a preponderance of the evidence in the case, and the plaintiffs having failed entirely so to do, it becomes apparent that even if Weeks Field had been properly dedicated to a public use the plaintiffs could not have prevailed herein in their application for a preliminary injunction because of failure to show any special damage by reason of the action of defendant and/or intervenor.

McCormick v. Chicago Yacht Club, 163 NE 418;
60 A.L.R. 770;
16 A.J. p. 414 S. 67.

(c) The evidence (and by this I mean the pleadings and affidavits upon which this cause was submitted) shows that the intervenor has built a schoolhouse costing $660,000 upon said Weeks Field and that if a preliminary injunction were granted in this case the intervenor would be unable to use said school by reason of the danger of injuring and killing some of the 450 school children if planes were permitted to land and take off from Weeks Field; that intervenor would simply have to close down the school house and rent quarters in basements, churches, and other places around town at a cost of $134,800 during the probable time before final judgment herein. This matter was

set forth by affidavit and by intervenor in its first affirmative defense, and no denial of the same was made by plaintiffs.

There is no showing by the plaintiffs of any damage to them in any specific amount if the preliminary injunction be denied. There are general statements of irreparable loss, etc., in paragraph XVI of the amended complaint. Paragraph XVI of said amended complaint is denied by the defendant and intervenor and no showing of loss was made by plaintiffs other than the allegations above mentioned in said paragraph XVI. It thus appears that the loss which would be incurred by the intervenor from the allowance of a preliminary injunction would be many times greater than that which would be suffered by the plaintiffs, which would furnish a sufficient ground for denying the preliminary injunction.

(d) As the decisions of the Supreme Court show that plaintiff must have a clear right to the issuance of a preliminary injunction, it appears that no such injunction should be issued in this case.

Ohio Oil Company v. Conway, 278 U.S. 813;
Harrisville v. Dickey Clay Mfg. Co., 289 U.S. 334;
Mayo v. Lakeland Highlands Cannery Co., 309 U.S. 310.

(e) It is alleged in defendant's third further and affirmative defense set forth in the answer and in intervenor's third affirmative defense to plaintiffs' amended complaint that the plaintiffs are indebted to

the defendant for the use of Weeks Airport in the part in the following sums:

Northern Consolidated Airlines	$5,500
Fairbanks Air Service	$ 565
Alaska Flying School	$ 480

The allegations of said indebtedness are not denied by plaintiffs.

While said indebtedness might throw some light on the financial standing of said plaintiffs it would not seem that said indebtedness should constitute a bar in this equitable suit under the maxim that he who seeks equity must do equity and must come into the court with clean hands.

Plaintiffs have made no showing whatsoever that the defendant or the intervenor is unable to respond in damages to any extent that is probable in this action.

From the above matters it appears that plaintiffs' application for a preliminary injunction, as mentioned above, should be denied.

Done at Fairbanks, Alaska, this 4th day of March, 1952.

/s/ Harry E. Pratt,
District Judge

(Endorsed:) Filed March 4, 1952.

United States Court of Appeals
for the Ninth Circuit

No. 13,357

Fred Seltenreich, et al.,
Appellants,
vs.
The Town of Fairbanks and Fairbanks School District, an independent School District Corporation,
Appellees.

JUDGMENT.

Appeal from the District Court for the District of Alaska, Fourth Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Fourth Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered March 10, 1954. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Fred Seltenreich and Hawley Evans, a partnership doing business as Fairbanks Air Service, Jess Bachner, W. C. Mitchell and David B. Phillips, a copartnership doing business as Fairbanks Aircraft Service, Appellants, vs. The Town of Fairbanks and Fairbanks School District, an independent School District Corporation, Appellees.	No. 13,357 Mar. 10, 1954

Oppeal from the District Court for the Territory
of Alaska, Fourth Division

Before: Denman, Chief Judge.
Healy and Pope, Circuit Judges.

This is an appeal from an order of the District Court of Alaska denying appellants' motion for an interlocutory injunction enjoining the Town of Fairbanks from closing Weeks Field, an airport owned and formerly operated by the Town. The motion is subsidiary to a plenary suit seeking permanent injunctive relief.

Appellants are severally engaged in aircraft service, or in the operation of a training school for pilots, and prior to its closing were using the field in these enterprises. They, or some of them, appear to own adjacent

property, and one of them claims to be the owner of a right of way over lots giving access to the field.

It appears from the showings for and against the motion that beginning with the year 1922 the Town acquired by purchase or otherwise various tracts of the land which serve to make up Weeks Field. Several parcels were acquired by deed from the Territory from private owners, which deeds apparently contained no restrictions. The bulk of the area was transferred to the Town by the United States, or rather by the Townsite Trustee, its agent. These latter transfers directed that the tracts be held by the Town in trust "for park and recreational purposes," and provided for reversion should they be otherwise used. Subsequently it appears to have been determined that the Townsite Trustee was without authority to impose restrictions of this character; and in order to dispense with them the Town deeded the tracts to the United States which in turn conveyed them back to the Townsite Trustee with instructions to grant the same "omitting the reversionary clause." Accordingly in 1950 the Town obtained the lands unconditionally.

In 1950 the corporate limits of Fairbanks were extended to embrace Weeks Field. About this time an extensive airport, constructed by the Federal government some two miles from the Town, was completed and became available for general public use. It appears that the Civil Aeronautics Administration transferred its functions to the latter field, ceasing supervision over the Weeks airport runway and discontinuing its operation of the control tower there. The

Fairbanks School District, an organization indepentent of the Town, acquired from the latter a parcel of land on the municipal airport and proceeded to build a school there, accommodating ultimately 750 pupils. The school building itself is said to extend into the airport runway. These several developments and other considerations induced a determination on the part of the city council of Fairbanks to close Weeks Field and abandon its use as an airport.

Appellants' counsel frame the question for our decision in this fashion: "May a municipal corporation lawfully abandon a public airport?" In their effort to negative that proposition they have supplied us with a brief of a hundred forty pages citing more than three hundred cases, none of which is materially helpful so far as concerns the specific situation before us. We need not stop to inquire whether appellants have standing to sue; for present purposes, disregarding the Town's argument to the contrary, we assume that they have. Nor is it necessary to explore the broad field of abstract opinion into which counsel's labors have carried them. (Footnote: The briefs—more especially that of the appellants—discuss the point whether the Town holds the airport in its proprietary or in its governmental capacity, appellants adhering to the latter theory. The question is interesting, but in the circumstances of this case we regard it as purely academic.) A sufficient answer to the question as to the validity of the measures the Town of Fairbanks has taken in the specific situation confronting it may, we think, be arrived at in fairly brief compass.

The powers in general of city councils of municipalities in the class of Fairbanks are set out in the Alaska Compiled Laws, Annotated, 1949, Title 16 Article 1, § 35. Subdivision Twentieth of that section authorizes those bodies "to acquire by purchase or otherwise, and to hold real estate and other property * * * and to sell, lease, or otherwise dispose of such real estate and other property, * * * including property acquired or held for any public use or devoted thereto, when in the judgment of the city council the same shall no longer be required for municipal purposes; * * *" (Footnote: The power to acquire, maintain and operate airports was specifically delegated in subdivision Fifty (b) of the same Section. However, this provision was superseded by the Alaska Municipal Airport Act of February 24, 1949. Ch. 14 SLA 1949. This Act authorizes the disposal by municipalities of airports and facilities "in accordance with the laws of this Territory governing the disposition of other property of the municipality.") (Emphasis supplied.) By legislative amendment approved March 22, 1951, it was provided that no sale, lease or other disposition of real property valued at more than $5,000 shall be valid unless ratified by a majority of the qualified electors of the municipality voting at an election held for that purpose. Ch. 61 SLA 1951. However, we are not necessarily concerned here with problems relating to the sale or other disposition of municipal property, but rather with the authority of the city council to determine whether and when property acquired or held by a municipality for any public use or devoted

thereto ceases to be needed for such use. That such power of judgment is intended to be vested in the city council seems implicit in the statutory language above italicized. No ratification by the voters is required by the statute to confirm that judgment; nor would it appear to be essential that the exercise of the council's judgment in this respect be coincidental with the sale or other disposal of the property. (Footnote: It is significant in this connection to compare the provisions of 1 Alaska Compiled Laws Annotated, 1949, p. 253, relating to the vacation of streets and alleyways. These provisions authorize the common councils of incorporated towns to vacate by ordinance streets and alleys when required by public interest and convenience. But the statute requires ratification of the vacating ordinance by the qualified voters of the Town.)

The Municipal Airport Act, § 2(7) (a), referred to in footnote 2, supra, authorizes municipalities to adopt "such reasonable ordinances, resolutions, rules, regulations and orders as it shall deem necessary for the management, government, and use of" airport facilities under its control "whether situated within or without the town limits of the municipality. For the enforcement thereof, the municipality may, by ordinance or resolution, * * * fix penalties, within the limits prescribed by law, for the violation of municipal ordinances * * *"

In September 1951 the city council of Fairbanks adopted a resolution ordering that "the said municipal airport commonly known as 'Weeks Field' be, and

the same is hereby, closed for use as an airport and the use of the same on and after the 15th day of October, 1951, either for the landing or the taking off of airplanes is hereby prohibited." The resolution recited at length the circumstances impelling the council to take this action. Among the reasons stated were the inability financially of the Town to continue the maintenance of the airport or to employ proper persons to manage and control the same; the availability of the much larger, better constructed and safer airport made available by the Government within two miles of the City; the fact that the governmental airport is under the control of the Civil Aeronautics Administration and is ample to serve all the needs of the Town of Fairbanks and the general public for a public airport that Weeks Field was presently being used only by a small number of one-engine airplanes; that a new school building had been constructed in close proximity to Weeks Field runway with the result that the continued use of the field endangered not only the lives of those using the airport but the lives of the children attending the school and of other people living in the vicinity; and that the further continuance of the airport was no longer necessary for the general welfare or of benefit to the general public and was unfit for the landing of aircraft.

This resolution was followed a few days later by the adoption by the council of an ordinance prohibiting the use of the land owned by the City, commonly known as Weeks Field, for airport purposes and prohibiting the landing and taking off of aircraft there-

from. Violation of the ordinance was declared a misdemeanor punishable by fine or by imprisonment for not to exceed 30 days. Shortly afterwards, and prior to the closing date specified in the resolution, appellants moved the court for the interlocutory injunction the denial of which is the subject of this appeal.

Appellants argue with many references to decided cases that an airport is not a nuisance per se, but at most is a nuisance in fact; and that the problem as to whether it is the latter poses a judicial question, hence one beyond the competence of the city council. Doubtless an airport operated under normal conditions and with adequate supervision and controls is not classifiable as per se a nuisance, but it is clear that Weeks Field had ceased to belong in that category. Under the conditions described its continued use for the landing and taking off of planes posed an obvious hazard to life and limb which the council was not warranted in ignoring. The prohibition and penalizing of such operations was an appropriate exercise of the police power of the municipality. Moreover, it must be remembered that the land was the property of the Town, not of appellants. The council, acting under authority of law and in the exercise of its considered judgment, had determined that the use of the property as an airport was no longer in the public interest, and had closed it to aviation. Those facts in themselves would seem to be decisive of the case.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 10, 1954. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, April 30, 1954.

Before: Denman, Chief Judge,

Healy and Pope, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING.

On consideration thereof and by direction of the Court, IT IS ORDERED that the petition of Appellants filed April 15, 1954, and within time allowed therefore by rule of Court for a rehearing in the above cause be, and hereby is denied.

Supreme Court of the United States

Fred Seltenreich and Hawley Evans, a Partnership doing business as Fairbanks Air Service, et al.,

Petitioners,

vs.

The Town of Fairbanks School District, an Independent School District Corporation.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner(s), IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 10th, 1954.

s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of July, 1954.

CONSTITUTION OF THE UNITED STATES
ART. I—LEGISLATIVE DEPARTMENT

SECTION 10. No State Shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

CONSTITUTION OF THE UNITED STATES
AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES
AMENDMENT 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LAWS OF ALASKA, 1951
CHAPTER 61
AN ACT

Amending Sec. 16-1-35 Twentieth ACLA 1949 pertaining to acquisition and disposition of property by a municipal corporation.

BE IT ENACTED BY THE LEGISLATURE OF THE TERRITORY OF ALASKA:

Section 1. That Sec. 16-1-35 Twentieth ACLA 1949 is hereby amended to read as follows:

Sec. 16-1-35 Twentieth: (Acquisition and disposition of property). To acquire by purchase or otherwise, and to hold real estate and other property, or any interest therein, and to sell, lease or otherwise dispose of such real estate and other property, or interest therein, whether now owned and held or hereafter acquired, including property acquired or held for any public use or devoted thereto, when in the judgment of the city council the same shall no longer be required for municipal purposes; to sell, lease or donate and/or exchange with the United States, the Territory of Alaska, or any political subdivision thereof, any

real estate or other property, or any interest therein, now owned and held or hereafter acquired, whenever in the judgment of the city council such action shall appear advantageous to the city; provided that in the sale or other disposition of real property or any interest therein now held or hereafter acquired by any city valued at more than $5,000.00, the city council shall by ordinance fix and prescribe the terms of said sale, lease or other disposition of such property, and the consideration accepted by the city there for when so fixed by the city by ordinance shall be deemed adequate and final; and provided further, that no ordinance for the sale, lease, exchange or other disposition of any real property or any interest therein valued at more than $5,000.00 shall be valid unless ratified by a majority of the qualified voters voting at a special or other election at which the question of the ratification of such ordinance is submitted. Thirty days prior notice shall be given of any such election and during said period the city council shall cause to be published at least once each week in some newspaper published in the city a notice stating the time of such election, the place of voting, describing the property so to be sold, leased, exchanged or otherwise disposed of, giving a succinct statement of the terms and conditions of the sale and the consideration thereof, if any, and stating the title and date of passage of the ordinance for the sale, lease, exchange or other disposition of said property. If no newspaper be published in the city, notice of said election and the purposes thereof in the manner and form hereinabove stated shall be given by

posting such notice or copies thereof in at least six public places in the city at least thirty days prior to any such election.

Provided further that the common council, in order to make available sites for the installation and operation thereon of new industries which will benefit the civic welfare of the municipality, may likewise acquire, own and hold such sites, including real property, either within or without the corporate limits and may sell, lease or dispose thereof upon such new industry or industries, and such sites, as well as any right, equity, claim or title now or hereafter acquired by the municipality in and to real property sold to it for delinquent taxes, shall not be deemed to be "property acquired, owned or held for any public use or devoted thereto" as used herein.

This Act shall not be held to affect the provisions of Chapter 32 of the Session Laws of Alaska of 1917 (Sections 16-6-1, 16-6-2 herein.)
Approved March 22, 1951.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS.

(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall

be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 8. GENERAL RULES OF PLEADINGS.

(c) Affirmative Defenses. In pleadings to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, aribitration and award, assumption or risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 52. FINDINGS BY THE COURT.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law

which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of any other motion except as provided in Rule 41 (b).

No. 271

NOV 9 1954

HAROLD B. WILLEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1954

FRED SELTENREICH AND HAWLEY EVANS, A PARTNERSHIP, D/B/A FAIRBANKS AIR SERVICE, JESS BACHNER, W. C. MITCHELL AND DAVID B. PHILLIPS, A CO-PARTNERSHIP, D/B/A FAIRBANKS AIRCRAFT SERVICE,

Petitioners,

V.

THE TOWN OF FAIRBANKS, AND FAIRBANKS SCHOOL DISTRICT, AN INDEPENDENT SCHOOL DISTRICT CORPORATION,

Respondents.

Brief of Respondents in Opposition To Petition for Writ of Certiorari

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No. 271

In the Supreme Court of the United States

OCTOBER TERM, 1954

FRED SELTENREICH AND HAWLEY EVANS, A PARTNERSHIP, D/B/A FAIRBANKS AIR SERVICE, JESS BACHNER, W. C. MITCHELL AND DAVID B. PHILLIPS, A CO-PARTNERSHIP, D/B/A FAIRBANKS AIRCRAFT SERVICE,

Petitioners,

v.

THE TOWN OF FAIRBANKS, AND FAIRBANKS SCHOOL DISTRICT, AN INDEPENDENT SCHOOL DISTRICT CORPORATION,

Respondents.

Brief of Respondents in Opposition To Petition for Writ of Certiorari

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STATEMENT OF CASE

On September 17, 1951, the Common Council of Respondent Town, by Resolution No. 51, adopted September 17, 1951, ordered the closure of its municipal airport, effective October 15, 1951. Subsequently, by Ordinance No. 527, passed and approved September 17, 1951, (R. 50) the Respondent Town made it unlawful for any person, firm, corporation, co-partnership or association,

to land or take off from said municipal airport after the effective date of closure. On October 12, 1951, Petitioners filed an Amended Complaint (R. 3-51) in the District Court for the District of Alaska, Fourth Division, in which they sought to enjoin the Respondent Town from closing its municipal airport and from disposing of any of the property composing that airport.

At the time of the council action, the Territorial law governing the acquisition and disposition of property by municipal corporations was spelled out in Section 16-1-35, Sub-part 20th, *Alaska Compiled Laws, Annotated, 1949*, which authorized such corporations of which Respondent Town was one, "to acquire by purchase or otherwise and to hold real estate and other property or any interest therein, and to sell, lease or otherwise dispose of such real estate and other property or interest therein, whether now owned and held or hereafter acquired, including property acquired or held for any public use or devoted thereto, when in the judgment of the city council the same shall no longer be required for municipal purposes * * * ." (Set out in full in the Petition for Writ of Certiorari at pages 56 to 58 of the appendix to that petition.)

As revealed by Petitioners' Complaint, the theory upon which they sought relief was that the municipal airport had become public property by dedication and use (R. 6), that they had standing to question the actions of Respondent Town by virtue of their being property owners adjacent to said airport (R. 7), and more specifically, that they were successors in interest to a right-of-way allegedly reserved by one Harold Gillam to the muni-

cial airport (R. 5). To show irreparable loss and injury, Petitioners alleged generally the existence of contracts with "the Government of the United States of America, the Territory of Alaska, and many private individuals" the performance of which would be prevented or impeded, and that the exact amount of "their detriment or damage could not be determined" (R. 8).

Both Respondent Town and Intervenor Respondent, Fairbanks School District, denied the essential allegations of Petitioners' complaint as summarized above.

Affirmatively, it was alleged by Respondent Town in effect that the municipal airport was a commercial and private enterprise (R. 67); that the Federal Government had constructed a new airport two miles from town which could adequately serve the needs of the Petitioners, the town and the general public (R. 68); that insofar as service to the public, generally, was concerned, use of said airport had been abandoned (R. 68); that the Town was no longer financially able to continue the operation of said airport, and that its continued use would endanger "not only those living in the vicinity of said airport, but the children who attended school in the vicinity of said airport and those operating planes using same" (R. 68-69), and that the Petitioner, Fairbanks Air Service, was primarily engaged in the business of instructing persons to fly and that Petitioner Fairbanks Aircraft Service was engaged in the repair business (R. 69-70).

Respondent School District affirmatively alleged that it had acquired from the town a portion of the

area sought to be kept open by Petitioners and constructed thereon a new school at a cost to the taxpayers of over $660,000 (R. 78, 79, 85); that continued operation of the airport would prevent use of the new school because of the hazards and dangers to the personal security and welfare of the children attending that school (R. 82, 83); that deprivation of use of the new school for a period of two years would cost the District the sum of $134,800 (R. 84), and that there would be immeasurable loss of educational opportunity to the children of the community by reason of overcrowded facilities and makeshift classrooms (R 84).

Respondent School District also alleged affirmatively that the Civil Aeronautics Board had ordered the municipal airport closed to all traffic, and the present use of that airport was mainly by student pilots.

On the 19th day of October, 1951, Petitioners moved for a preliminary injunction without notice, based upon an affidavit by their attorney that he had been advised by one of the City Attorneys of the Town's intention to construct a power line across the airport, and otherwise based upon the verified pleadings as above outlined. This motion was denied by the District Court on the day presented (R. 106). From this order, and the further order of the District Court denying Petitioners' motion for an injunction pedente lite, filed October 12, 1951 (R. 51, 52), Petitioners appealed to the United States Court of Appeals for the Ninth Circuit (R. 149, 150). From the decision of the Court of Appeals (211 F. (2d) 83), affirming the

District Court, Petitioners have applied to this Court for Writ of Certiorari.[1]

ARGUMENT

I. Introduction

Petitioners do not allege or argue that their case falls within any of the standards prescribed by Rule 19, paragraph 1 (b), of this Court for review by certiorari. It may be assumed, therefore, that they contend that other urgent and compelling reasons exist for review. The crucial points for determination by the District Court and the United States Court of Appeals were (1) municipal authority under territorial statutes to abandon an airport; (2) the construction of deeds to privately owned land within the territory; and (3) the law of dedication of municipally owned lands. These points would seem to be peculiarly adaptable for decision by the Territorial District Court and its final Court of Appeals; and should not invoke the interest of this Court as an important matter for federal concern. Nor would the reasons set up in Petitioners' Questions Nos. 1 to 4 require different result.

II. Answer to Petitioners' Question No. I

With reference to Question No. 1 as presented by the Petition, it is submitted that the United States Court of Appeals made no determination of questions which were not fairly before it on appeal. It

[1] R. refers to the original Transcript of Record in the United States Court of Appeals and presumably now on file in this Court.

found that the Territorial Legislature, by statute, had vested the council of Respondent Town with authority "to determine whether and when property acquired or held by a municipality for any public use or devoted thereto ceases to be needed for such use." And it found further, in effect, that there was no abuse of discretion in the making of that determination under the reasons recited by the City Council in Resolution No. 51. That the Appellate Court did rely on the good faith of the elected representative body of a people, in the absence of clear and convincing evidence to the contrary upon the question of whether or not a temporary injunction should issue, is not startling. The United States Court of Appeals did nothing more than find in the light of the entire record that no sufficient showing for a temporary injunction was made; and undoubtedly was of the opinion that the general and unsupported allegations of the Petitioners' amended complaint as to vested interests, contract rights and irreparable injury would not justify an injunction with such consequences as might flow therefrom if the findings of the town council were correctly made. In the light of experience, that court could not do otherwise. Petitioners had it within their power to submit supporting affidavits, if available, to strengthen their showing. They apparently chose not to, and now complain.

If as submitted, the Circuit Court of Appeals reached a correct decision on the review of the record, little could be gained by examining the opinion of the District Court. The Circuit Court took a different tack and reached the same result.

In fairness to the District Court, it may be observed that the findings of that Court to which Petitioners object are, by and large, of a legal nature—the construction of Territorial Statutes and local deeds. That Petitioners would object to both the District Court and United States Court of Appeals construing a Territorial Statute applicable to the case is an absurd appeal for judicial blindness.

III. Answer to Petitioner's Question No. II

Counsel for the Petitioners cast aspersions upon the statement of the District Court that where no answer or denial of any sort was filed by the Plaintiffs to the Intervenor's first affirmative defense, it would be assumed that the Plaintiffs intended to and did admit the matters set forth in such defense. They make much about this statement being a gem of judicial reasoning and wisdom without calling this honorable Court's attention to the sound statutory and Court Rule authority for making the statement. Under Sections 55-6-52, 55-6-53 and 55-6-54, and also under Section 58-4-2, *Alaska Compiled Laws, Annotated, 1949*, the procedure is set up under which applications for preliminary injunction may be made upon verified pleadings and affidavits. Those sections are set out in full as follows:

> "55-6-52. **Allowance before judgment: Undertaking.** An injunction may be allowed by the court or judge thereof at any time after the commencement of the action and before judgment. Before allowing the same the court or judge shall require of the plaintiff an

undertaking, with one or more sureties, to the effect that he will pay all costs and disbursements that may be decreed to the defendant, and such damages, not exceeding an amount therein specified, as he may sustain by reason of the injunction if the same be wrongful or without sufficient cause.

"55-6-53. **Filing undertaking and affidavits: Service and filing of order.** The undertaking and affidavits, if any, upon which the injunction is allowed, shall be filed with the clerk. The order may be served as a summons and returned to the clerk, with a proof of service indorsed thereon, except that the service shall be made upon the defendant personally. The order may be filed with the clerk at once, and shall be deemed to be served upon the defendant from the date of its allowance, if it appear therefrom that the defendant appeared before the court or judge at the allowance thereof.

"55-6-54. **Acts which may be enjoined.** When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce injury to the plaintiff; or when it appears by affidavit that the defendant is doing or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights concerning the subject of the action, and tending to render the judgment

ineffectual; or when it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, or any part thereof, with intent to delay or defraud his creditors, an injunction may be allowed to restrain such act, removal, or disposition.

"58-4-2. **When use of affidavits permissible.** An affidavit may be used to prove the service of a summons, notice, or other paper in an action or proceeding to obtain a provisional remedy, the examination of a witness, or a stay or proceedings, or upon a motion, and in any other case expressly provided for by law, except as provided in the next section."

In effect at the time the instant case was under consideration by the District Court was Rule No. 4 of the *Uniform Rules of the District Court for the District of Alaska*, which reads in full as follows:

"Upon the hearing of any application for an interlocutory order, the facts shall be presented by affidavits or other documentary evidence, unless the court upon application and cause shown shall permit oral evidence to be introduced; the affidavits and documentary evidence in support of the application must be filed with it, or by leave of the court at the hearing; and copies of the application and evidence in its support must be served on the opposite party at least three days before the hearing; the opposing affidavits and documentary evidence shall be served on the applicant at least one day before the hearing. For cause

shown, the court or judge may modify the time mentioned above or grant an extension of time to make further showing or defense."

The above-mentioned local rule does not conflict with Rule 65, *Federal Rules of Civil Procedure*, Title 28 USCA, because, in the latter-mentioned Federal Rule, preliminary injunctions may be granted upon affidavit or by verified complaint.

At no time in this proceeding did the Rules 7 and 8 of the *Federal Rules of Civil Procedure*, Title 28 USCA, ever apply because the matter being heard and before the trial court was only a motion for preliminary injunction and not a trial upon the merits; therefore, under our local practice, it was incumbent on the Plaintiff Petitioners to answer the affirmative defenses set up in the Respondents' answers. Otherwise the Court could and did take these matters to be admitted so far as the hearing on the preliminary injunction was concerned.

Certainly no reply would be necessary or is necessary under the new *Federal Rules of Civil Procedure* to put a case at issue for trial on the merits. On all matters of an interlocutory nature including motions for injunctions pendente lite, under the local rules in force, these matters must be heard upon affidavits, verified pleadings and counter affidavits.

In support of this position, the Respondents respectfully call the Court's attention to the case of *Linde Air Products Co. vs. Johnson*, 77 F. Supp. 656, wherein the Court said at page 658: "It

should be pointed out that the allegations of plaintiff's complaint are not traversed. They stand admitted on this motion. (Motion for temporary injunction.)"

In *Group vs. Finletter*, 108 F. Supp. 327, the Court said on page 328: "Defendant has filed no counter affidavit, and therefore for the purposes of the motion before the Court, (for temporary injunction) the allegations in the affidavit of the plaintiff must be considered true. Federal Rules of Civil Procedure, Rule 9 (d) 28 USCA."

We believe it abundantly clear under the authorities that there was no abuse of discretion on the part of the trial court or the Circuit Court of Appeals below. In this connection, we respectfully call the Court's attention to the case of *South State Street Bldg. Corporation*, 140 F. (2d) 363; cert. den. 322 U. S. 761, wherein the court said: "It requires no citation of authorities to sustain the proposition that the granting or refusal of a temporary injunction lies within the discretion of the trial court and is reviewable here only for an abuse of that discretion. The denial of a motion for a temporary injunction, based upon a verified complaint alone, was certainly no abuse of discretion, where the complaint did not state a cause of action or any facts showing irreparable injury" (at page 366).

In *Steinberg vs. American Bantam Car Company*, 76 F. Supp. 426, the court said: "It is a rule, subject to few exceptions, that a preliminary injunction should not be awarded on ex parte affidavits, unless in a clear case" (at page 430).

IV. Answer to Petitioners' Question No. III

Examination of the opinion of the District Court reveals that the District Judge made a careful analysis of all the exhibits which were attached to the pleadings of the several parties, and, upon basis of those exhibits determined that there was not sufficient evidence to justify a temporary injunction based upon Petitioners' controverted allegations that the Respondent Town's municipal airport had been devoted or dedicated to a public use. This would appear to constitute fair compliance with Rule 52 (a) of the *Federal Rules of Civil Procedure*, 28 USCA.

But even were it otherwise, it is difficult to understand how the United States Court of Appeals has been misled into committing "grievous error" (Petition, page 29). That Court held that the council of the Respondent Town could, under Territorial Law, abandon or close its municipal airport regardless of whether or not it was dedicated or devoted to a public use. If Petitioners were truly concerned about the Appellate Court being misled by the District Court's failure to comply with Rule 52 (a), that failure should have been called to the Circuit Court's attention. It was not. No assignment of error was made on appeal, nor was such error alleged or argued, orally or by brief, before the Appellate Court.

V. Answer to Petitioners' Question No. IV

Petitioners maintain that they will be deprived of property and property rights without due process of law, should the "decisions of the District Court of the District of Alaska and the United

States Court of Appeals for the Ninth Circuit be allowed to stand."

In their complaint (Paragraph XI, R. 6, Paragraph XIV, R. 8) they have alleged that they were "property owners adjacent to Weeks Field (the municipal airport in question) and have vested property interests therein" and that they were "performing contracts with the Government of the United States of America, the Territory of Alaska, and many private individuals * * *." It is to be noted that although the Petitioners documented their complaint in detail by exhibits with reference to the acquisition by the Respondent Town of the land comprising said airport, they failed to append any deeds or supporting affidavits to show title to property adjacent to said airport, or any of the many contracts which they allegedly were performing. This Court may draw its own inferences as to Petitioners' particularity in one case and their generality in the other. This Court may also consider whether or not the lower courts were, in substance, correct in denying a motion for preliminary injunction predicated on such general allegations in face of the weight to be attached to the findings of Respondent Town's council and the specific allegations of the Respondent Intervenor's answer.

It is also difficult to perceive how Petitioners have been damaged by any untoward delay of the District Court in ruling on their motion for preliminary injunction. Had that Court ultimately sustained their motion, and the condition of the airport so changed so as to make its use impossible, there would be damage. Such was not the case.

Furthermore, the record does not show any attempt by the Petitioners to set the case for trial. It was at issue. Nor does the record show any attempt by the Petitioners to expedite the hearing on their appeal to the court below. It is to be noted in this respect that the appeal was argued orally before the United States Court of Appeals, Ninth Circuit, on February 23, 1954, almost two years after the action of the District Court complained of. If Petitioners have indeed been injured, such injury may very well be the product of their own lack of diligence. Petitioners are still entitled "to their day in court" if they so elect.

The other points raised in Petitioners' Question No. IV have been treated elsewhere herein.

CONCLUSION

For lack of a substantial Federal question and for the reasons heretofore set out, it is respectfully submitted that the petition for writ of certiorari filed herein should be denied.

Respectfully submitted,

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